

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

Civil Appeal No. ABU 0095 of 2016
(High Court Civil Appeal No.HBC 182 of 2014)

BETWEEN : **VITI FOODS LIMITED**

Appellant

AND : **NEW INDIA ASSURANCE COMPANY LIMITED**

Respondent

Coram : **Basnayake JA**
Lecamwasam JA
Almeida Guneratne JA

Counsel : **Mr. E. Narayan with Ms. K. Singh for the Appellant**
Mr. G. O'Driscoll for the Respondent

Date of Hearing : **11 May 2018**

Date of Judgment : **01 June 2018**

JUDGMENT

Basnayake JA

[1] I agree with the reasons, conclusion and the orders proposed by Guneratne JA.

Lecamwasam JA

[2] I agree with the reasons and the conclusion of Guneratne JA.

Almeida Guneratne JA

Introduction and Background Facts

- [3] This is an appeal against a judgment dated 15th July, 2016 of the High Court at Suva which struck out the Writ of Summons and dismissed the Appellant's (original plaintiff's) Marine Insurance claim ('the insured') against the Respondent (original Defendant) ('the insurer').
- [4] The statement of Claim of the Appellant is at pages 13-15 of the Record of the High Court (RHC), the statement of Defence of the Respondent at pages 19-20 and the Appellant's reply to the Defence at page 22 thereof.
- [5] Based on those pleadings, at the pre-trial Conference, certain agreed facts were recorded and issues to be determined by the Court were framed which are contained at pages 44-46 of the RHC. I reproduce them here for purposes of easy elucidation.

"MINUTES OF PRE-TRIAL CONFERENCE

AGREED FACTS

1. *The Plaintiff was at all material times:*
 - (a) *a company duly incorporated and able to sue in and by its corporate name and style;*
 - (b) *The insured under a Marine Open Policy No. 922623/MR03122430056;*
 - (c) *A manufacturer of foodstuffs and exporter of the same.*
2. *The Defendant at all material times was:*
 - (a) *a company duly incorporated and liable to be sued in and by its corporate name and style;*
 - (b) *A licensed insurer for the Republic of Fiji and as such able to write policies of insurance including Marine Open Policy.*
3. *At all material times, the Plaintiff was fully interested in a Policy of Marine Open insurance.*

4. *The Defendant insured the Plaintiff's cargo of 1 x 20GP container holding 1000 cartons of Machli Tuna Chunks and Flakes in Vegetable Oil being canned fish of Fiji origin valued at USD\$31,440.00 ("the goods") in the ship "Yellow Moon/114" at and from Suva, Fiji to Port Jawahar Lal Nehru (JNPT), Mumbai, India against the perils of the sea and for any loss, damage or expense covered on interest not unpacked and held in the warehouse.*
5. *The said goods were duly shipped in the said vessel for carriage from Suva to Mumbai under the Bill of lading No. 500015045 dated 23rd March 2011.*
6. *While the said Policy was in force and while the said goods were so insured as aforesaid, the said goods became subject of a claim under the said Policy, which was not fully accepted by the Defendant and has become subject of these proceedings.*
7. *The said goods were shipped on the Yellow Moon JNPT and shifted to Messrs. Maersk CFS Nhava Sheva, Mumbai, India. The exact dates of unloading is unknown, however, the IGM date was 7 May 2011. The goods while in storage at the Maersk yard were damaged in part i.e. by fire as a result of an explosion at the Maersk storage yard on 11 May 2011 while inside CFS.*
8. *The said goods damaged amounted to 55 cartons which were fully burnt and/or charred resulting in them being rendered debris while 945 cartons were intact.*

ISSUES TO BE DETERMINED

- i. *Did the Plaintiff by way of mitigating its loss seek to re-ship the intact cartons but they were lost and/or destroyed while in the care, custody and control of the Maersk storage facility to where they were shipped and unloaded?*
- ii. *Whether the Plaintiff is entitled for full indemnity for the losses sustained to and amounting to USD\$31,440.00 in terms of Marine Open Policy No. 922623/MR 03122430056?*
- iii. *Whether the Plaintiff is only entitled to partial indemnity for the losses sustained to and amounting to USD\$1,729.20 in terms of Marine Open Policy No. 922623/ MR 03122430056 as assessed by the Defendant?*

- iv. *Is the Plaintiff entitled to interest on any sum awarded at such rate and for such period as this Honourable Court shall think fit; Costs; and Any further remedy or relief this Honourable Court deems just?*
- v. *In the event the Court finds that the Defendant's assessment of the loss is correct as per issue III, is the Defendant entitled to its costs on a full indemnity basis?*

AGREED DOCUMENTS

1. Parties shall agree to a Bundle of Documents before trial and provide the documents in the usual way as permitted by the rules of evidence."

- [6] In so far as the factual undisputed background context relating to the dispute is concerned I recap what the learned High Court Judge recounted at paragraphs (1) to (3) of his Judgment viz:

" [1] The plaintiff exported to India 1000 cartons of canned fish in the ship "Yellow Moon / 1114" from Suva under the Bill of Lading No. 500015045 dated 23rd March 2011. The shipment was stored at the Maersk Storage Yard and part of the consignment was damaged by fire that erupted in the yard due to an explosion. According to the plaintiff value of the consignment was US\$31,440.

[2] This consignment was insured with the defendant and when the plaintiff made the claim the defendant offered US\$1,729 on the basis that due to the fire only 55 cartons were damaged and the balance 945 cartons were saleable.

[3] The plaintiff instituted these proceedings to recover the value of the entire consignment from the defendant."

- [7] I need only to add here that, (Mr.) O'Driscoll, on behalf of the Respondent, re-iterated his willingness to indemnify the Appellant for the said 55 cartons in the sum of USD\$1,729.00.

- [8] Mr. Narayan (senior counsel of the Appellant) maintained that he was entitled to be indemnified for the entire consignment of 1,000 cartons and not just for 55 of them. No

doubt, that is the basis the Appellant has appealed against the Judgment of the High Court.

[9] Although the matter of the 55 cartons are contained in No. 8 of the Agreed Facts and No. iii of the Issues to be determined as (Mr.) Narayan submitted the learned High Court Judge had not addressed that issue in his orders.

[10] I felt that it was necessary to deal with Mr. Narayan's said submission at the very outset.

The Judgment of the High Court

[11] I shall begin by recounting *in toto* the evidence which the learned Judge addressed his mind to in the light of the pleadings, the agreed facts and the issues framed for determination, leading up to his conclusion.

"[5] The plaintiff at the trial called two witnesses to testify; the Risk and Insurance Officer of C.J. Patel & Company of which the plaintiff company is a subsidiary and the Insurance Broker. Both these witnesses were not very well conversant with the factual position of the case. Their evidence was based on the documents tendered in evidence. The facts pleaded in the statement of claim that 55 cartons out of 1000 carton were destroyed by fire and the balance 945 cartons were saleable, the defendant offered to indemnify for the destroyed 55 cartons and that the plaintiff intended to re-export unaffected cartons were facts admitted by both parties. Therefore the main issue for determination is whether the plaintiff is entitled to be indemnified for the balance 945 cartons of the consignment.

[6] It is common ground that the insurance policy also covered the loss of or damage to the consignment caused by fire or explosion.

[7] The plaintiff's own pleadings show that only 55 out of 1000 cartons were damaged. The documents (P10, P11 and D1) tendered in evidence show that the plaintiff was making arrangements to re-export the reaming cartons of the consignment to see whether they could be sold in Fiji with the intention of minimising the loss.

[8] The document "P7A" is a document prepared by the plaintiff company. In the said document it is stated as follows;

As a consequence of this unforeseen circumstance, the product cannot be sold as Machli Tuna because in doing so, it will give rise to misinformation as far as the label is concerned.

However, that does not warrant the product inedible as shown in the organoleptic from Enviro... Laboratory (India), the products are acceptable for human consumption.

[9] This evidence shows that the contents of the remaining 955 cartons were suitable for human consumption although quality may have gone down to a certain extent. In the circumstances the plaintiff should have brought the remaining 955 cartons back as it intended, to ascertain the exact loss caused by the fire. The plaintiff was not able to bring the consignment back to Fiji because it was destroyed by the customs authority in Mumbai. Before destroying the goods were confiscated and the plaintiff was ordered to make certain payments to the customs.

[10] Paragraph (i) of the order (D1) of the Additional Commissioner of Customs (Import) reads as follows;

I confiscate the goods imported vide Bill of Entry No B/E No. 3487748 dated 12.05.2011 under Section 111(d) and (m) of Customs Act, 1962. However, I give an option to the importer to redeem the goods which were unaffected by fire for re-export to the same supplier on payment of fine of Rs. 50,000/- (Rupees Fifty Thousand only), under section 125 of the Customs Act, 1962. The option to redeem goods, if exercised, shall be done within Fifteen days of the receipt of this order. The goods shall be released only on payment of appropriate duty, fine and penalty and other dues applicable.

[11] Since the plaintiff failed to comply with the above order the custom authority in Mumbai destroyed the remaining cartons of the consignment.

[12] It is the plaintiff who brought this action and therefore, the burden of proving the matters averred in its pleadings is fairly and squarely on the plaintiff. The evidence adduced by the plaintiff does not prove that the remaining cartons of the consignment were damaged by fire for the defendant to become liable to indemnify the plaintiff. It appears from the evidence that the 945 cartons which were not damaged by fire has been destroyed by the Indian customs authorities when the plaintiff failed to comply with order of the Additional Commissioner of Customs (Import).

[13] Once the pleadings are filed the matter the court has to adjudicate upon circumscribed in the pleadings. In this case the plaintiff has failed to aver in its pleadings or to adduce any evidence to show the basis on which it claimed damages for the 945 cartons which were not damaged by fire”.

[12] I shall now refer to the Notice and Grounds of Appeal urged by the Appellant against the said Judgment which are contained at pages 1 to 4 of the RHC.

Grounds of Appeal

1. *THAT the Learned Judge erred in law and in fact by finding that the Appellant was not entitled to be indemnified by the Defendant under the Marine Open Marine Open Policy No. 922623/MR 03122430056 ("Marine Policy") on the totality of the evidence as adducted by the Appellant;*
2. *THAT the Learned Judge erred in law and in fact in failing to hold in the totality of the evidence adduced that the Appellant had established its claim in terms of the applicable Marine Policy and was accordingly entitled to Judgment in the sum claimed;*
3. *THAT the Learned Judge erred in law and in fact in holding in the absence of evidence and/or credible evidence that the 955 cartons were suitable for human consumption and that the Appellant should have brought these 955 cartons back to ascertain the exact loss caused by the fire in the Mumbai Port, in India;*
4. *THAT the Learned Judge erred in and in fact by finding that the Appellant failed to comply with the Order of the Commissioner of Customs (Import) and as a result the 955 cartons were destroyed by the Customs Authority of India, when in fact the goods were totally destroyed on 4th April 2012 by the Mumbai Warehouse Department.*
5. *THAT the Learned Judge erred in law and in fact by finding on the evidence that the Appellant did not establish the 955 cartons were damaged by the fire in the Mumbai Port in India and were fit for human consumption when:*
 - (i) *The assessors report dated 17th September 2011 stated that fire happened due to chemical explosion at the Mumbai Port;*
 - (ii) *The assessors report did not mention how many cans were tested;*
 - (iii) *The testing of the cans were done by a private laboratory and not by the Ministry of Health (India);*
 - (iv) *That there was no certification provided by the Ministry of Health (India) stating that the goods were fit for human consumption in India;*

- (v) *That the nutrients contents of the tuna cans were clearly affected was relayed to the Respondent;*
 - (vi) *The Respondent Assessors Report dated 17th September 2011 showed inter alia, that there was a GP container arrived on shipper's load, stow and count was with hazardous chemical not disclosed to carrier/C.F.S, which was alleged that the cargo/chemical exploded during the handling leading to fire.*
6. *THAT the Learned Judge erred in law in not holding on the evidence that the Appellants claim was within the terms and conditions of the Marine Open:*

Particulars

- (i) *The Policy covered for loss or damage to the subject matter insured reasonably attributable to fire or explosion;*
 - (ii) *The insurance attaches to the goods from the time the goods leaves the warehouse or place of storage at the place named, for the commencement of the transit and continues during the ordinary course of transit;*
 - (iii) *That the policy covered such excess subject matter insured and would be liable for the full amount at risk in the event of an accumulation of the subject matter insured, beyond the limit expressed in the Policy by reason of any interruption of transit, occurrence beyond the control of the assured and causality;*
 - (iv) *The Marine Policy attached from the time goods leave the warehouse and reaches destined warehouse.*
7. *THAT the Learned Judge erred in law by finding that the Appellant was not entitled to be indemnified by the Defendant under the Marine Policy when none of the exclusions mentioned in the Policy were established on the evidence adduced by the Respondent.*
8. *THAT the Appellant reserve his right to argue and/or file further or revised grounds of appeal."*

Consideration of the Respective Submissions

[13] Mr. Narayan (for the Appellant) submitted thus:-

- (i) The Insurance Policy covered perils from “warehouse to warehouse” (the Policy is found at pages 199 to 224 of the HCR). Counsel specifically referred to Clause 8.1 of the Policy (This was not disputed).
- (ii) The delay in re-exporting the 945 cartons that were not destroyed by the fire was on account of the appellant’s supplier not co-operating to have them taken back to Fiji in order to test whether the goods were fit for human consumption. After all, (Mr.) Narayan submitted, though not destroyed, the 945 cartons had also been exposed to the fire, which had been caused by a chemical explosion.
- (iii) The refusal on the part of the Respondent to pay the full claim was based on the Assessors Report (pages 149-163 of the HCR) as revealed by the Respondent’s letter to the Appellant’s lawyers dated 30th May 2014 (page 99 of the HCR).
- (iv) The goods were found to be fit for human consumption though not as under the initial description on account of possible changes that may have occurred due to long term exposure to very high temperature. That is why the Appellant had wanted to bring back the goods to Fiji;
- (v) But before that could be done they were destroyed by the Mumbai Waste Department.
- (vi) The Respondent was always aware that the Appellant wanted to bring back the goods to Fiji.
- (vii) The Assessor had specifically stated, when concluding his report/Certificate that it was being issued.

“...without prejudice and subject to the terms and amount of the policy of Insurers.”
- (viii) Consequently, (Mr.) Narayan argued, “the denial of liability to pay did not fall within any of the exclusions under Clause 4 of the policy, an aspect the learned Judge did not cover at all in his judgment”.

[14] I have sought to summarise the submissions made by Mr. Narayan in relation to the several grounds of appeal save for ground 4, which I shall deal with up front.

Ground of Appeal No. 4 (vide: Paragraph (12) of this judgment)

[15] In the Appellant's written submissions dated 16th May, 2017, it is stated as follows:-

"That the learned Judge erred in law and in fact by finding that the Appellant failed to comply with the Order of the Commission of Customs (Import) and as a result the (945) cartons were destroyed by the Customs Authority of India when in fact the goods were totally destroyed on 4th April, 2012 by the Mumbai Waste Department."

[16] Mr. Narayan argued that, that letter of 4th April, 2012 (at page 139 of the RHC - 'Exhibit P8') shows that the goods had been destroyed sometime prior to 4th April, 2012 whereas the Order of the Commission of Customs had been made on 27th October, 2012 (Exhibit D1) calling upon the Appellant to remove the goods from where they were being held within 15 days and imposing a fine as well on the basis that, the Appellant had failed to do so. (Vide: pages 134 -1 37 of the RHC).

[17] In response to the submissions made by Mr. Narayan, Mr. O'Driscoll for the Respondent joined issue as follows:-

(i) He referred to his written submissions dated 11th May, 2018 which stated that;

"...Exhibit P8 does not list or specify what items were destroyed and therefore did not prove that all of the cartons were destroyed..."

[18] Adverting to the evidence of witness (Mr. Monal Narayan) called on behalf of the Appellant (at pages 258 – 259 of RHC), the evidence of witness (Mr.) Mahesh Kumar called by the Respondent (pages 337-338 of the RHC) and to the Order made by the Commissioner of Customs (D1), Mr. O'Driscoll submitted that, the only reasonable conclusion should be that it was the burnt 55 cartons that had been destroyed as per Exhibit P8 being part of "the hazardous waste debris" and not the 945 cartons which were salvaged.

[19] Mr. Monal Narayan in cross – examination conceded that, the packing list for the entire 1,000 tuna cartons showed a total weight of 10.3 metric tons (mt) whereas P8 showed the total weight of the goods destroyed as shown therein as 112.94 mt. (pages 258-259 RHC).

[20] In reply, Mr. Narayan addressed on the aspect of the identification of the goods, and is, the 945 cartons referring this Court particularly to the evidence of Mr. Kumar at pages 347-348 of the RHC.

[21] That the debris was heavier than the consignment stood established. In that regard Mr. Narayan's question to witness Mr. Kumar had been:

".... Didn't you think that it would be appropriate to appoint an assessor to check that plea?"

[22] Mr Kumar's answer had been:

"If the items are destroyed so how can an assessor to check that plea?"

[23] When one looks at that evidence, it would appear that some element of doubt did arise at first blush as to whether at least some of the 945 cartons had been destroyed prior to 4th April, 2012 when the Customs Commissioner's letter of 27th October, 2012 had been sent. There is also no evidence on Record to show as to when all or some at least out of the 945 cartons were in fact destroyed.

[24] However, on the evidential principle that, "one who asserts must prove", I am of the view that, it was incumbent on the Appellant to have led some evidence to dispel such doubt which the Appellant (plaintiff) did not do. The trial Judge himself did not address his mind to that aspect.

[25] In the result, this case being a civil action, the standard of proof being “on a balance of probabilities, I am inclined to accept the submissions of (Mr.) O’Driscoll on that point which I have re-capped above. Accordingly, I reject the said ground of appeal No. 4. I shall refer to that matter again later when I consider the other grounds of appeal which I have recounted at paragraph [13] in this judgment

Considering the Other grounds of Appeal summarised at paragraph [13] above in this Judgment

[26] Whether one goes on the rival arguments based on Exhibit ‘P8’ or Exhibit ‘D’ or not, there had been a delay on the part of the Appellant in not re-shipping the salvaged 945 cartons in issue. That delay, in the Appellant’s own submission had been on account of its unsuccessful negotiations with its supplier in the context of the Appellant’s endeavour to re-ship the 945 cartons to Fiji in the hope of selling them even at a depreciated value, in as much as they were found to be fit for human consumption though under a description in as much as, the said goods in the 945 cartons, having been exposed to a fire caused by a chemical explosion may have suffered some difference in quality.

[27] That is a matter the Respondent might have had to give consideration on the basis of the clause in the Policy in question as regards its liability to transport from “warehouse to warehouse”.

[28] However, before the goods could be so re-shipped they had been destroyed by the Mumbai authorities in whatever spacio-temporal circumstances that had been done on which the competing arguments were advanced based on exhibit ‘P8’ on the one hand and exhibit ‘D1’ on the other.

[29] But, the bottom line is the fact that the said goods were destroyed on account of the delay (whatever that procrastinating period was) on the part of the Appellant due to the time taken in its negotiations with its supplier, in its endeavor to have the goods re-shipped, to sell them even at a depreciated value.

- [30] That delay was no doubt on account of a commercial decision which the Appellant had taken. But, the point is, the Appellant had taken that risk. Had the Appellant taken the step of removing the said goods without delay, the Appellant would have been entitled to come within Clause 8.1 based as it were on the Respondent's liability to convey the goods from "warehouse to warehouse" (page 214 of the RHC).
- [31] In his endeavour to get over the question as to "the delay", Mr. Narayan relied on the schedule and specification in the policy (vide: the Appellant's written submissions dated 16th March, 2017 at paragraph 51). Learned counsel also submitted that "the delay" contemplated in Clause 4.5 of the policy was to mean delay in terms of perishable items for which submission (Mr) Narayan) adverted to Mr. Kumar's evidence at pages 335 – 336 of RHC.
- [32] I am afraid I cannot read Mr Narayan's interpretation of delay into clause 4.5 (page 216 of the RHC)
"Clause 4.5: in no case shall this insurance cover loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against"
- [33] More-over, Mr. Kumar was asked:
"the delay in that clause isn't it for the perishable items or is it for any items?
The answer was:
"Sir, any delay" (the bottom at page 335 of the RHC)
- [34] I also looked at Clause 19 of the policy which refers to Avoidance of Delay. It provides that:
"It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control."
- [35] Even if I were inclined to think that the Appellant had not acted unreasonably in the circumstances, namely, the Appellant negotiating with its supplier in order to re – ship

the 945 cartons to Fiji, the fact is, that was the result of its own decision which was therefore within its Control and for which the Respondent could not have been held responsible merely because the said negotiations had been unsuccessful causing the delay leading to the destruction of the goods.

- [36] The Appellant not having removed the goods as aforesaid, I found myself unable to subscribe to the Appellant's contention that its claim still fell within the said clause taken together with Clause 1.1.1 of the Policy which states that;

"This insurance covers, except as provided in clauses 4, 5, 6 and 7 below loss of or damage to the subject-matter insured reasonably attributed to fire or explosion." (Page 214 of the RHC).

- [37] Clause 4.5 had provided that;

"In no case shall this insurance cover... loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against..."

The Test for Causation

- [38] In Lloyds TSB General Insurance Holdings Ltd. v Lloyds Bank Group Insurance Co. Ltd [2001] Lloyds's Rep. I.R. 237, it was laid down that, *...the test for causation is the same in insurance as in general tort law."*

Ascertaining the proximate cause of a loss

- [39] The House of Lords as way back in the year 1918 had laid to rest the view that the proximate cause was the last event to occur. (See: Leyland Shipping Co. Ltd. v Norwich Union First Insurance Society Ltd [1918] A.C. 350.

Subsequent Judicial Approach in the wake of the said House of Lords decision in ascertaining the proximate cause of a loss

Extracting the proximate cause of the loss from concurrent causes

- [40] Grappling as the Courts had done in the wake of that House of Lords decision, there had emerged thinking based on concepts such as “concurrent causes”, that is, where it would not be possible to isolate a proximate from the chain of circumstances leading up to the loss.

Extracting the proximate cause from what had come to be regarded as “the effective cause” or the “operative cause” or “the dominant cause” of the loss

- [41] Having gone through several authorities in regard to what, no doubt, appears to have been a vexed question, I could not find any decisive assistance on the applicability of the “proximate cause rule” and in that regard I can do no better than to echo what had been said thus:-

“...though the rule is universally admitted, lawyers have never attempted to work out any philosophical theory of cause and effect, and it is probably as well for commerce that they have never made the attempt. The numerous decisions on the rule are rough and ready applications of it to particular facts. As might be expected, many of the decisions are difficult to reconcile. But the apparent inconsistencies may be regarded as depending rather on inferences of fact than on matters of law.” (vide: Chalmers, Marine Insurance Act 1906, 9th Ed., 1983, at p.78).

Interpretation and Consideration of the Proximity Rule of Causation

A brief survey of the judicial history in England

- [42] As way back in the year 1890 Lord Esher MR in Pink v. Fleming distinguished between Marine policies, where the Court would look simply for “the last cause” and non –

Marine policies, where it would be prepared to go back further and look for the efficient cause (1890) 25 QBD 396 at 397.

- [43] But in Reischer v. Borwick [1894] 2 QB 548, the Court, while apparently agreeing with Esher MR, did not apply the distinction in practice.
- [44] Then, in the 1918 House of Lords decision in Leyland Shipping Co. Ltd (supra), the House rejected Esher MR's distinction and approved of Reischer (supra).
- [45] In or around the same time Lord Sumner had pointed out that, "Proximate cause is not a device to avoid the trouble of discovering the real cause or 'the Common sense cause'. Becker, Gray and Co v. London Assurance Corporation [1918] 1AC101 at 112.
- [46] Lord Greene MR had declared that causation "is really a matter for the common sense and intelligence of the ordinary man." (Athel Line Ltd v. Liverpool London War Risks Insurance Association [1946] 1KB 117 at 122.
- [47] Lord Wright in Yorkshire Dale SS Co. Ltd v. Minister of War Transport had described the notion of causation as something that is to be understood as the man in the street, and not as either the scientist or the metaphysician would understand it" [1942] AC 691 at 706.

Critical reflections on the aforesaid judicial views without reference to the "Insurance Policy" in the instant case.

- [48] The 945 cartons (the goods) were not destroyed by the fire. They had been destroyed by the customs authorities in Mumbai when they were still in a warehouse there.

- [49] How would the ordinary man view the matter? Would he say that, the last cause being the act of the customs authorities that resulted in the destruction of the goods in question and not the fire and therefore the Insurance showed not be held liable? Or would he say that “the efficient cause” must be looked for?
- [50] How would a scientist or a metaphysician look at the matter ? Would he be in a position to view the matter differently? Or would he say that , the “proximate cause is not a device to avoid the trouble of discovering the real cause or the common sense cause?” (Becker Gray and Co. per Lord Sumner (supra), the reason why that had led Lord Denning to say that “I do not care for this emphasis on “*novus actus interveniens*” (Wayne Tank Co. Case, infra.)
- [51] His Lordship said “It seems to me to be going back to the old forsaken test of the latest in time “ (1974) 1 QB.57 at pp. 66 – 67.

Interpretation and Consideration of the Proximity Rule of Causation of the Proximity Rule of Causation in the light of the terms of the Policy in that back drop.

- [52] Being apparently conscious of the vagaries involved in the interpretation of insurance claims as demonstrate above, the Respondent (Insurer) has put in express wording covering that aspect in Clause 4.5 wherein it had been provided that:
- “..loss damage or expense proximately caused by delay (emphasis is mine) even though the delay be caused by a risk insured against...”
- [53] That wording effectively excludes rival arguments that had arisen in the context of ascertaining as to what was to be regarded as the proximate cause of the loss complained against.

- [54] More-over the proximity rule, in any event, being based on the presumed intention of parties (vide: Resicher v Borwick [1894] 2 QB 548, 550, Becker Gray v London Assurance [1918] AC 101 and Leyland v Norwich Union [1918] AC 350 at 362, 370, the terms of the Policy in my construction of the terms of that policy meant that if the insured cause is within the risks covered, the insurers are liable (basically what Mr. Narayan's submissions were reduced to relying as he did on clauses 1.1.1 and 8.1 of "the Policy").
- [55] But, if it fell within the perils excepted the insurer would not be liable (the contention advanced by Mr.O'Driscoll for the Respondent based as it were on Clause 4.5 , which contention I found to be supported by a long *cursus curiae* beginning from the 19th century to the present times. (vide: Ionides v. Universal Marine [1863] 14 C.B.N.S. 259; Marsden v City & County Insurance [1865] L.R.A C.P. 232; Cory v Burr [1883] 8 App. Cas 393; Lawrence v Accidental Insurance (1881) 1 Q.B.D. 216 and Wayne Tank Co. v Employers Liability Assurance Corp. [1974] Q.B. 57.

General words of Coverage as against the particular terms of exclusion

- [56] It must be said that general words of coverage on the policy are contained in clauses 1.1.1. read with Clause 8.1 of "the policy".
- [57] But, how were the particular terms of exclusion as contained in Clause 4.5 as to the aspect of delay to be regarded?

How was that conflict in the terms of "the policy" to be resolved? – Insured event (peril) v Excepted peril

- [58] I must confess, I was impressed by Mr. Narayan's contention in that regard. However as to how that conflict could be resolved, I finally looked for and adapted the view that: "... the general words of coverage must bow to the particular words of exclusion" (vide: page 119 of Colinvaux's Law of Insurance) (supra).

- [59] Consequently, having looked at the general terms of coverage” (in clauses 1.1.1 read with Clause 8.1. I was driven to the view that, “the particular words in Clause 4.5 of the Policy” regarding the question as “to delay” had to be construed as prevailing over the said general words of coverage.
- [60] I do acknowledge the efforts made by Mr. Narayan in trying to mitigate the loss by re-shipping the said 945 cartons in question to Fiji to sell them even at a depreciated value but the Appellant’s procrastination in doing so, on account of its unsuccessful negotiations with its supplier is a matter which had nothing to do with the Respondent.
- [61] Although, as submitted by Counsel for the Appellant that, the learned High Court Judge had not addressed that aspect, I do not see that as a reason to set aside, the judgment of the High Court or even to send the matter back for a re-trial, in as much as this Court was in a position to consider the matter by reason of the powers vested in it under Rule 15 (1) of the Court of Appeal Act (Cap 12) to go into and determine the matter as if it’s a Re-Hearing.
- [62] Consequently, I hold that, out of the grounds of appeal referred to at paragraph (12) above which I have summarized at paragraph (13)(ii) [principally] and grounds (iii), (iv) and (v), being incidental thereto are (iii) read with (vii) which was basically on not entitled to succeed leaving ground (vi) basically on the Assessor’s evidence. In the said summary (viii) being Ground of Appeal No. 7 I have already rejected earlier feeling justified in doing so by reason of Rule 15(1) of the Court of Appeal Act, particularly in view of the fact that, that question depended on the interpretation of the terms of the policy in the light of the principles and doctrines on Insurance claims and law which I have discussed earlier although it is true that, as contended by Mr. Narayan, the learned High Court Judge had not addressed the same.

- [63] In so far as (iii) read with (vii) are concerned I found in S. Kumar's evidence (the Assessor) was not biased and was direct in regard to the disputed claim which I have recapped earlier. It must be noted that, an insurer would immensely rely on an assessor's report which it had done. The Appellant's contention that, based on the alleged conflict between 'P8' and 'D1', the Respondent ought to have called for another Assessment Report is a contention I cannot subscribe to.
- [64] If the Appellant felt aggrieved, then, it was up to the Appellant to have moved to lead evidence by calling an Assessor of its choice to throw light on that matter.
- [65] As held in Foreign Marine Insurance Co. Ltd v. Gaunt (1921) 2AC 41 and more recently in Rhesa Shipping Co. SA v. Edmunds (The Popi M) [1985] 1 WLR 948, "it (was) up to the insured to establish on a balance of probabilities that the loss was proximately caused by an insured peril.
- [66] That, the Appellant failed to do.
- [67] Thus, (iii) being out of the way, I was left with only (vi) (vide: paragraph 13 of this Judgment) to consider.
- [68] In so far as (vi) is concerned, I could not find how the said ground could constitute a valid ground of appeal at all, for the reason that, there is nothing to show on the Record of Proceedings that, the Respondent had acquiesced in the negotiations the Appellant had indulged with its supplier – which had resulted in the delay in taking steps to have the 945 cartons shipped back. Mere awareness cannot amount to acquiescence.

Re: Liability of the Respondent to indemnify the Appellant for the said 55 cartons

- [69] This is the last matter that this Court felt obliged to address and in that regard I hark back to what I have referred to earlier at paragraphs (5), (6), (7) and (9) of this judgment.

[70] On the basis of the facts revealed in the said paragraph I think the learned Judge should have addressed the issue in his discussion of the facts and in the orders which he has not done, notwithstanding the refusal of the part of the Appellant to accept payment for the said 55 cartons as pleaded in the Statement of defence of the Respondent at paragraph 7 thereof (pages 19 – 20 of the RHC).

[71] For the aforesaid reasons, I proceed to propose the following orders.

The Orders of the Court are:

1. *The judgment of the High Court dated 15th July 2016 is affirmed and the Appeal is dismissed.*
2. *The Respondent shall indemnify the Appellant in a sum of USD\$1,729.20 with interest thereon until final payment in terms of the provisions of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935.*
3. *In all the circumstances of this case, parties to bear their own costs.*



.....
Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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

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