IN THE FIJI COURT OF APPEAL

Civil Appeals Nos. 98 & 99 of 1985

Between:

THE NEW INDIA ASSURANCE CO. LTD. Appellant

- and -

DOWNTOWN HOLDINGS LIMITED Respondent

And Between:

THE NEW INDIA ASSURANCE CO. LTD. Appellant

- and -

TIME INVESTMENTS LTD. Respondent

Mr. H.K. Patel for the Appellant
Mr. V.K. Kalyan for the Respondents

Date of Hearing: 16th day of July, 1986
Delivery of Judgment: 18th July, 1986

JUDGMENT OF THE COURT

Holland, J.A.

These two appeals from judgments of Dyke J. were heard together as they were in the Supreme Court. They involve precisely the same facts. Both respondents were insured with the appellant company in respect of damage which they suffered in a hurricane between 17th and 19th January 1985. There was no dispute as to liability. The appellant

appointed assessors to investigate and negotiate towards a settlement of the respondents' claim.

On 7th May, 1985 the respondents agreed with the appellant's assessor and a form of discharge in each case was executed on behalf of the respondents. In the case of Downtown Holdings Limited the form was as follows:-

" OUR REFERENCE NO: H/E 119

Subject to the New India Assurance Co. Ltd. Downtown Holdings as (i) Unit Trust Trustees Co. Ltd. as first (m) Australia and New Zealand banking group as 2nd (m) hereby offer to accept the sum of Dollars Ten Thousand Eight Hundred and Sixty Eight ($10,868.00) in full/partial settlement and discharge of claim from loss by Hurricanes Eric/Nigel 17-19/1/85 under Policy No. 622/01/764/85 and I/We declare that there is no other insurance covering the same property.

Signed - 'Signature' - Director
Address - P.O. Box 60, Lautoka
Date - 7/5/85

Witness - D.C. Craig
Address - Toplis & Harding
Date - 7/5/85

This proposal is subject to deduction of noting excess and we confirm that no further damage was occasioned during Hurricanes Gavin and Hina in March 1985.

'Signature' "

The form signed on behalf of Time Investments Limited was exactly the same except for the substitution of name and the substitution of $14,760.00 for $10,868.00.

The appellant was notified of the settlement by telex from its assessors and on 17th May 1985 wrote to the Solicitors for both respondents and another as follows:-

" Our ref. no. LTK/F/EN/85/1061/429
LTK/F/EN/85/1304/429
LTK/F/EN/85/1052/429

17th May 1985

Mr. B.C. Patel
C/- Stuart Reddy and Company
Barristers and Solicitors
P O Box 60
LAUTOKA

"Without Prejudice"

Dear Sir,

RE: AJC PATEL BROTHERS
TIME INVESTMENTS
DOWN-TOWN HOLDINGS

We have been advised by Messrs Toplis and Harding that the above claims have been settled for $18,895.34, $14,760 and $10,868.00, respectively. Though we are yet to receive the reports from Messrs Toplis and Harding, about these settlements, we are prepared to release progress payments as per enclosed Vouchers which we request you to discharge.

Yours faithfully

Sgd. V.K. Bhasin
BRANCH MANAGER

VKB/lb

Encl. "

The vouchers or discharges enclosed with the letter referred to the amounts of the progress payments - $7,500.00 and $10,000 respectively but were worded in a printed form as being "in full and final discharge". In each case these discharges were signed on behalf of the respondents on 7th May, 1985 with the words "full and final" struck out and replaced by "partial" and the addition of the words:- "Subject to claim for interest due to delay".

It was this somewhat provocative gesture on behalf of the respondents and the subsequent intransigence of all parties that led to the litigation in the Supreme Court with a subsequent appeal to this Court.

On 28th May, 1985 the appellant sent each respondent through their Brokers a third form of discharge for signature confirming the settlement made on 7th May, 1985 and making appropriate adjustments for excess provisions in the policies. At that stage neither respondent had received the progress payments offered on 17th May, 1985. Both respondents instructed their Brokers to advise the appellant that as they had already signed two forms of discharge there was no need for the third. The appellant until the time of judgment refused to make any payment because neither respondents had signed an unconditional discharge as required by it.

On 7th August, 1985 each respondent took out an originating summons seeking orders that the appellant pay the respondents $10,868.00 and $14,760.00 together with interest at 13.5 per centum per annum from 7th May, 1985 and costs. On 13th September, 1985 Dyke J. ordered payment of the sums sought together with interest at 13.5 per centum per annum from 17th May, 1985 and costs. The appellant has appealed against these orders.

There is not, and never was, any issue as to the appellant's liability to pay the sums sought. The only question in issue was the claim for interest.

It is common ground that the Insurance Policies contain no provision for payment of interest for late payment, but that the Court in its discretion may award interest for late payment if that late payment is due to default on the part of the appellant. (See Halsbury's Laws of England 4th Ed. Vol. 25 para 521 and Webster v. British Empire Mutual Life Assurance Co. (1880) 15 Ch. 169.

In this case the question is whether the appellant was entitled to refuse to make payment because of the actions of the respondents in adding the reservation of the right to claim interest due to delay to the discharge on the occasion of the offer to make a progress payment, and the refusal to sign the third form of discharge submitted by the appellant.

Counsel for the respondents submitted that an insurance company had no right to insist on a discharge or a receipt as a prerequisite to payment. He relied on a passage in McGillivray and Parkington on Insurance 7th Edition para 1278 where it is said:-

> "The company is obliged to pay out to the claimant upon the production to it of such evidence as does or ought reasonably to satisfy it that he is entitled at law to the policy moneys. In this respect the obligations of an insurance company do not differ from that of any other debtor. It is not entitled to insist on any formal discharge from the claimant as a precondition to payment; and, whilst it may ask for a receipt, the refusal to give a receipt does not justify the company in withholding payment."

We are of the view that this passage must be considered with some circumspection. The authorities cited for it are cases decided in 1793 and 1848 and do not relate to claims under insurance policies. They did not deter Jessel M.R. from saying in re Haylocks Policy (1876) 1 Ch. D. 611 at p. 613:-

> "I have always understood that an assurance office has a right to a legal discharge."

In the light of the facts as we find them to be we do not consider it necessary to decide the point as there is no evidence here of a tender of payment coupled with a refusal to give a receipt or discharge.

The attitude of the respondents was that they had already tendered an offer of discharge through the assessors appointed by the appellant and that had been accepted by the appellant. Hence the appellant had no right to require them to sign a further discharge.

We were asked to give guidance as to the capacity of an assessor to settle a claim. Although the appellant appeared by its letter of 17th May, 1985 to have accepted the assessors' authority to settle, the form of discharge is clearly stated to be subject to the appellant admitting liability. It may well be, that at least until its letter of 17th May, 1985 it could have declined to have been a party to the settlement but the question does not arise as the appellant confirmed the settlement.

The only purpose of a discharge is a record available to the appellant that the respondents accepted the payment in full settlement. The appellant had in its possession such a document in the first form of discharge signed by the

respondents. All it had to do was admit liability confirm the settlement and make payment. It cannot successfully claim to have an absolute right to a discharge in its own form adding nothing to the already existing situation in the absence of a specific provision to this effect in the policy.

We do not consider that the addition of the reservation of the right to claim interest for late payment affected the issue. The appellant should have tendered payment. If the respondents had then refused to accept payment without including interest then the respondents might well have had difficulty in persuading the Court that they had a claim for interest in view of the relatively short period between the negotiation of the settlement on 7th May and the tender, if there had been one, at the end of May. Such, however was not the case. The respondents were not paid when they should have been and we consider that the trial Judge was correct in ordering interest as he did.

It follows that but for some minor amendments the appeal should be dismissed. In each case the reasons for judgment records that there was an excess of $50 but judgment was entered for the full amount. The judgments should each be reduced by $50 with a corresponding reduction in respect of interest. Costs were awarded in each case on the lower scale. As there was only one hearing and the respondents were represented by the same Counsel the award for costs should be restricted in respect of the hearing to one set of costs on the total of both judgments to be shared pro-rata between each respondent.

The appellant has brought this appeal and has lost. There appears to be no reason why the normal rule should not prevail. The respondents are entitled to costs on the appeal to be fixed by the Registrar but restricted to only one set of costs for hearing.

.....
Vice-President

.....
Judge of Appeal

.....
Judge of Appeal