

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

CIVIL APPEAL NO. ABU0039 OF 2002S
(High Court Civil Action No. 205 of 2001S)

BETWEEN:

FAI INSURANCES (FIJI) LIMITED

Appellant

AND:

RAJENDRA PRASAD BROTHERS LIMITED

Respondent

Coram:

Tompkins JA, Presiding Judge
Davies, JA
Ellis, JA

Hearing:

Thursday, 7th November 2002, Suva

Counsel:

Mr. B. Sweetman and Mr F. Haniff for the Appellant
Mr. B.C. Patel for the Respondent

Date of Judgment:

Friday, 15th November 2002

JUDGMENT OF THE COURT

This is an application for leave to appeal from an interlocutory order of a Judge of the High Court of Fiji, Pathik J, and also for an extension of time to appeal. On the hearing of the application, Mr. B. Sweetman and Mr. F. Haniff appeared for the applicant, FAI Insurances (Fiji) Ltd. ("FAI") and Mr B.C. Patel appeared for the respondent, Rajendra Prasad Brothers Ltd. ("Rajendra"). The Court heard counsel on the applications for leave and for extension of time and on the merits of the matter should leave be granted and time extended.

The parties are in dispute over the operation of policies of insurance, issued by FAI in favour of Rajendra: Fire Policy No. 325, Consequential Loss Policy No.326 and Motor Vehicle Policy No. 332. Clause 5.1(b) of Policies 325 and 326 and Clause 6.1 (b) of Policy 332 contain the following exclusion:

“This insurance does not cover any loss or damage occasioned by or through or in consequence or indirectly, or any of the following occurrences, namely:

(a)

(b) *Mutiny, civil commotion assuming the proportions of or amounting to a popular rising, military rising, insurrection, rebellion, revolution, military or usurped power, or any act of any person or persons acting on behalf of or in connection with any organisation, the objects of which include the overthrowing or influencing of any de jure or de factor government by terrorism or by any violent means.”*

Rajendra commenced proceedings in the High Court by way of Originating Summons seeking a declaration that loss and damage which occurred to Rajendra’s insured property on 19 May 2000 was covered by the policies of insurances and was not excluded by the operation of the exclusion clause. The only question in issue appears to be the operation of the exclusion clauses in the circumstances which occurred.

The Originating Summons was supported by an affidavit of Rajendra Prasad, who deposed, inter alia:

"14. From media reports and from information obtained by me I verily believe the following sub-paragraphs accurately set out the events that occurred on 19 May, 2000:

- (a) Permit was granted to Fiji Nationalist Party for a peaceful protest march in Suva to present a petition to the President. The Fiji Nationalist Party's march was joined by Nationalist Vanua Tako Lavo Party, Taukei Movement, Fijian Association Party, Foundation of Indigenous Peoples and some dissident members of Soqosoqo ni Vakavulewa ni Taukei Party.*
- (b) The march started at 9.00 a.m. from Flea Market, Rodwell Road, Suva and was to have ended at Albert Park but instead made its way to the gates of Government House to present their petition to the President.*
- (c) At about 10.30 a.m. a vehicle containing a number of individuals forced their way through the gates of the Parliamentary Complex in Suva by pointing a shotgun towards the police officer who was on duty at the Parliament House gate. The gate was opened by that police officer and the vehicle gained entrance. The main group of the gunmen then entered the Parliamentary Chamber. Other gunmen rounded up the staff and other Parliamentarians in their offices in the complex. The Parliamentarians were then separated. The Indian members were filed into an office, the Opposition Members to the SVT Chamber and the Fijian Government members into yet another room.*
- (d) At the gates to the Government House when the petition was being presented by the marchers to the President's Permanent Secretary, Joe Brown, announcement was made that there was a takeover of Parliament by armed gunmen and Parliamentarian including the Prime Minister taken captive.*
- (e) As the news of the armed takeover reached the marchers at the gates to the Government House a number of marchers ran towards Parliament House and on the way they started to throw stones and break shops along Ratu Sukuna Road - the breaking of shops along Ratu Sukuna Road in Nasese happened around 11.15 a.m. - 11.30 a.m.*

- (f) *News of the armed takeover spread like wild fire and shops and businesses in Suva city became a free for all, the situation degenerated into chaos and riot with wide spread looting taking place.*

- (g) *At about 1.30 p.m. a group of rioters broke into the Plaintiff's premises, looted goods and set the place on fire thereby completely destroying the building and everything in it including fixtures, furniture, chattels and stock. Further, a lorry parked on site was driven away loaded with goods from the store and when subsequently found had been extensively damaged."*

Similar cases which have been commenced by way of Originating Summons are Yatulau Company Limited v. Sun Insurance Company Ltd. (Byrne J. 2 July 2001, unreported) and Singh v. Sun Insurance Company Limited (Scott J, 24 July 2001, unreported). In both cases, the description of the relevant events of 19 May 2000 set out in the judgment is generally similar to the description given in para 14 of Mr Prasad's affidavit.

In each case, the learned Judge held that the insurance company was bound to indemnify the insurer for the losses suffered. However, in those cases, the policies were materially different from the present. In the present case, the subject exclusion clauses include the words "occasioned by or through or in consequence or indirectly or any of the following occurrences." Presumably, the words "in consequence or indirectly, or "should be read as meaning" in consequence of or indirectly by."

FAI applied to the Judge for an order under Order 28 or 9 of the High Court Rules that the proceedings continue as if begun by writ. His Lordship dismissed the application.

It is worth observing that the commencement of the proceedings by way of Originating Summons was authorised by Order 5. Pleadings were not required. The Summons stated precisely the matter in issue. A or the principal question will be the meaning and effect of the subject exclusion clauses.

An affidavit by Peter Fimone, Claims Manager of FAI, which was filed in support of the application before his Honour, contended that the facts of the case will be controversial and will best be ascertained by oral evidence. Mr Fimone deposed inter alia:

- “(i) I reject Mr Prasad’s version of the events that occurred on 19 May 2000, contained in paragraph’s 14(a) to 14(g) of his affidavit and say that there are contentious issues of fact which can only be determined by this Honourable Court after hearing oral evidence of witnesses to and participants in the events of 19 May 2000. It is the desire of the Defendant to subpoena witnesses to provide evidence of these facts.*
- (ii) Contrary to Mr Prasad’s assertion, newspaper and other media reports suggest that what happened in the Plaintiff’s premises and other business premises in the Suva Central business area on the morning of 19 May 2000 was occasioned by, or through or in consequence of, or indirectly as a result of the sequence of events that took place in Parliament that morning which acts amounted to, one or more of the occurrences set out in clause 5(1)(b) of the Policies referred to above.*

- (v) *The facts as they occurred show that part of the orchestrated plan was the intention to cause mayhem in Suva's Central business area to distract attention away from the events which were planned to occur and did occur, in Parliament and thus to spread any reaction by Police or other security services over a much wider area, thus allowing a very large number of people to enter Parliament grounds in support of the overthrow of Government.*
- (viii) *It is not practicable to adduce evidence in affidavit form to adequately describe the intent of those who took part in events which gave rise to the damage and destruction and the Defendant seeks leave, by the continuation of these proceedings as if begun by writ, to subpoena witnesses to provide evidence of the connection between those events and those occurring within Parliament.*

However, paragraph 14 of Mr Prasad's affidavit did not contain the assertions of cause and effect which Mr Fimone attributed to him. Later passages of his affidavit did so but, no doubt, they will not be read at the trial.

Order 41 r.5(1) requires that an affidavit shall contain only such facts as the deponent is able of his own knowledge to prove. Mr Prasad spoke from information and belief. It may be, as his Honour recognised, that there will be parts of the affidavit to which objection should and will be taken. However, insofar as in Mr. Prasad's affidavit set out a fair, albeit incomplete, description of the events, there will be little reason to object to it. In a civil case such as this, the parties should ensure that the general facts are proved in an efficient manner.

It is efficient to prove the general facts of the present case, so far as they are known, by affidavit. Many commercial courts now insist that evidence in chief is set out in an affidavit or witness statement on which the witness may be cross-examined. This means of proof speeds up a trial and facilitates pre-trial disclosure.

There is no apparent reason why, so far as is practicable, the evidence which FAI intends to adduce should not be set out in affidavit form. Many commercial Judges would insist that that be done, howsoever the proceedings were commenced. If some difficulty arises in complying with that regime, application can be made for an order under Order 28 r. 5 permitting oral evidence and authorising the issue of subpoenas. His Lordship's observation that, "In short the issue can be determined quite easily on affidavit evidence alone and without having to call oral evidence which the defendant wants." may turn out not to be justified. If the appellant is unable to obtain an affidavit from a witness it desires to call, the Court should provide procedures which enable justice to be served. If a witness who refuses to give an affidavit is called an order should be made directing the service of a statement setting out the evidence proposed to be adduced.

No error in the order made by his Honour has been demonstrated.

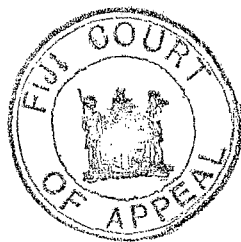
It should be added that this application seeks leave to appeal against an interlocutory order concerning a matter of practice and procedure. It has been stated, time

and time again, that such applications merely result in cost and delay. The present is no exception.

The application should be dismissed with costs fixed at \$500.

[Signature]
Tompkins JA, Presiding Judge

[Signature]
Davies, JA



[Signature]
Ellis, JA

Solicitors:

Munro Leys, Suva for the Appellant
Messrs. Young and Associates, Lautoka for the Respondent