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

CIVIL APPEAL NO. ABU0035 OF 2001S  
(High Court Civil Action No.HBC311 of 2000S)

BETWEEN:

NEW INDIA ASSURANCE COMPANY LIMITED

*Appellant*

AND:

D. GOKAL AND COMPANY LIMITED

*Respondent*

Coram:

Hon. Jai Ram Reddy, President  
Hon. Robert Smellie, Justice of Appeal  
Rt. Hon. John Henry, Justice of Appeal

Hearing:

Monday, 12<sup>th</sup> August 2002, Suva

Counsel:

Mr. H. Nagin for the Appellant  
Mr. H. Lateef for the Respondent

Date of Judgment: Friday, 16<sup>th</sup> August 2002

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JUDGMENT OF THE COURT

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Introduction

The circumstances giving rise to this litigation have already been reported twice in judgments at first instance (Pathik J. on 15/2/01 and Scott J. on 6/6/01) and in the decision of this Court in Civil Appeal No.ABU0013/20016 on 13/5/02. As a consequence they need only be briefly mentioned here. The crucial issues in the case are first the meaning of the words "Associated ..... Companies" in the Appellant's insurance policy and secondly whether

a failure to minimize by not appearing and opposing the damages claimed somehow disentitles or diminishes the Respondent's right to indemnity.

**The Essential Facts**

A vehicle owned by the Respondent while being negligently driven by one of its employees crashed. One Rajesh Prakash a passenger and employee of Homelco Limited was injured. He sued the Respondent and obtained judgment first as to liability and later for damages in the sum of \$121,224.50. Initially the Appellant accepted cover but subsequently withdrew - although its solicitors remained on the record. The Respondent did not attend or arrange for representation at the damages hearing. Prakash pressed for satisfaction of his judgment against the Respondent. The Respondent issued an Originating Summons seeking the following:-

- “(i) For a declaration that the first Defendant (Appellant) be liable to pay the sum of \$121,224.50 on behalf of the Plaintiff pursuant to the Judgment entered against the Plaintiff on the 19<sup>th</sup> day of November 1999 in Civil Action No. 350/96 : and***
- (ii) For an order that the execution of the said judgment entered against the Plaintiff on the 19<sup>th</sup> day of November 1999 be stayed pending the hearing of this Application upon the grounds contained on the Affidavit of V. Gokal filed herein”***

Scott J. heard the case and delivered judgment on the 6<sup>th</sup> of June 2001 upholding the Respondent's right to indemnity and rejecting an argument that cover had been lost or diminished by the Respondent's negligence.

### The First Crucial Issue

The policy pursuant to which the Respondent claims to be indemnified describes "The Insured" as follows:-

***"D. Gokal & Company Limited and/or McGregor Investment Limited and/or Gordon Investments Limited and/or Toorak Investments Limited and/or Gokal's Tea Company and/or Rakdev Holdings Limited and/or M B & V B Gokal and/or Levu's Clothing Company Limited and/or Bob Gokal and Sons Limited and/or McGregor Garments Limited and/or Kamjit Holdings Limited and/or Associated and/or Subsidiary Companies."***

Mr Nagin acknowledged several basic points early in the appeal. Thus it is not argued that Homelco was a subsidiary of the Respondent. Nor did counsel seek to show that the Respondent directly or indirectly controlled Homelco Limited. Two principals of law were also recognized. First that the shareholders of a Company and the Company itself are, and always have been, distinct legal entities. Secondly that in the case of ambiguity in a policy of Insurance the contra proferentem rule requires the doubt to be resolved against the interest of the party which drew the document - here of course the Appellant.

Asked to define what it was that made Homelco an Associated Company of the Respondent, Counsel for New India responded that there are common shareholders in both and each company belongs to a group of entities all of which are connected in one way or another to the extended family of the brothers M B and V B Gokal. That is substantially the way the claims officer of the Appellant put it in his second Affidavit in Opposition. At page 116 of the Record in paragraph 3 of that Affidavit the claims officer said:

***“That as to paragraph 5 of the Gokal’s Affidavit I say that D. GOKAL AND COMPANY LIMITED and HOMELCO LIMITED are associated companies because in both companies Chandan Vinod Gokal and Veritatem Nominees (Fiji) Limited (a trust company for Vinod Gokal) are shareholders. In both the companies Mr Vinod Gokal is the Managing Director and his wife Chandan Vinod Gokal and son Rakesh Gokal are directors...”***

The relevant annual returns of both companies are attached as exhibits. The two shareholders mentioned (Chandan Gokal and Veritatem Nominees (Fiji) Limited) held 20,625 out of the total of 75,000 shares in the Respondent at the time of the accident. One of them Chandan Gokal holding 10,000 shares was an alternate Director. There was a Board of five members which included Mr V B Gokal. In Homelco the two shareholders mentioned each held 50% of the shares. One was a Director on a board of 3, one of the other two Directors was Mr Vinod Gokal.

Of course Mr V Gokal was a beneficiary of the trust pursuant to which Veritatem Nominees (Fiji) Limited held shares in both companies and it is by that route that Mr. Nagin

endeavored to establish a common shareholding which ties back to Mr V Gokal. There is, however, no path, indirect or otherwise leading back to both "M B and V B Gokal" as recorded in the policy.

It appears that appreciating the difficulties facing him Counsel elected to advance the common shareholding as justification for describing Homelco as an associated company. But Mr Nagin drew back from asserting that either the Respondent or the brothers had control of Homelco. In advancing his argument Mr. Nagin asserted, correctly, that the words "associated .... companies" in the policy must be given some meaning. In our view the issue comes down to a question of whether a common shareholding is sufficient to establish such association or alternatively, is effective control required.

We were helpfully referred to a number of statutory definitions as follows:

★ EXPORT MARKET DEVELOP GRANTS ACT 1974 (UK) SECT 3

*"associated company", in relation to a claimant, means a company that is, any time during the claim period, a company :*

- a) *whose operations are, or are able to be, controlled, either directly or indirectly, by the claimant; or*
  
- b) *which controls, or is able to control, either directly or indirectly the operations of the claimant; or*

- c) *whose operations are controlled, or are able to be controlled, either directly or indirectly, by a person who controls or is able to control, or persons who control or are able to control, either directly or indirectly, the operations of the claimant;*

★ LIFE INSURANCE ACT 1995 (UK) SECT 128

*"128 Associated Company" For the purposes of this Part, a company (first company) is associated with another company if the 2 companies are related to each other and:*

- a) *the first company carries on life insurance business; or*
- b) *either of those companies is, or has directors who are, accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the other company or its directors.*

★ INSOLVENCY ACT 1986 (UK) SECT 24

*"A company is an associate of another company if (1) the same person has control of both, or a person has control of one and persons who are his associates, or he and other persons who are his associates, have control of the other; or (2) a group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating, in one or more cases, a member of either group as replaced by a person of whom he is an associate.*

*A company is an associate of another person if that person has control of it or if that person and persons who are his associates together have control of it."*

★ THE 18<sup>TH</sup> EDITION OF THE AUSTRALIA INCOME TAX GUIDE

*"Associated persons.*

*Payments to associated persons are allowable only to the extent that they are reasonable in the opinion of the Commissioner.*

*The following are deemed to be associated persons:-*

(1) *In reference to a taxpayer:-*

(a) *a relative of the taxpayer; or*

(b) *a partnership, a partner in which is a relative of the taxpayer."*

★ INCOME TAX ACT (CAP 201) Revised to 1<sup>st</sup> January 2001

In the Act there are references to "associated company" and in Section 12 of the Seventh Schedule there is the following definition:

*"Associated company" means a company in which the shareholders are common to another company, and, in determining whether shareholders are common, shares in 1 company held by another company, shall be deemed to be held by shareholders in the last mentioned company."*

(We interpolate to observe that the above definition is referring to a common shareholding which is exclusive of other shareholdings, whereas in the circumstances under consideration here, only some of the shareholders of each company are the same.)

As can be seen from the above definitions control is a frequent if not dominant feature in most of them. In the Court's view the words "Associated ..... Companies" in the policy are at least equally open to a requirement of control as opposed to a common

shareholding among some shareholders. Indeed we consider the former control requirement is the stronger contention.

Irrespective, however, once the point is reached where there is a genuine ambiguity as to how the words should be construed the contra proferentem rule resolves the issue in the Respondents favour.

The rationale of the rule and the way in one which it works is described as follows in Law of Insurance by Colinvax 4<sup>th</sup> Edition page 45 paragraph 2-10

*“Quite apart from contradictory clauses in policies, ambiguities are common in them and it is often very uncertain what the parties to them mean. In such cases the rule is that the policy, being drafted in language chosen by the insurers, must be taken most strongly against them. It is construed contra proferentes, against those who offer it. In a doubtful case the turn of the scale ought to be given against the speaker, because he has not clearly and fully expressed himself. Nothing is easier than for the insurers to express themselves in plain terms. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in the sense in which he might reasonably have understood it. If the insurers wish to escape liability under given circumstances, they must use words admitting of no possible doubt.”*

On that first crucial point therefore the appeal fails.

The Second Crucial Issue

This issue concerns the Appellants contention that the Respondent by failing to



appear at the damages hearing was guilty of negligence. The highest Mr Nagin could put it was either that had the Respondent appeared the damages may have been lower or alternatively an opportunity to settle had been lost which again might have resulted in lower compensation for Prakash. The first leg of the above involves the proposition that Pathik J's assessment recorded in a reserved judgment was wrong. The second is mere speculation. There is no evidence to support either contention and they therefore fail.

Furthermore it seems to the Court that the plea of negligence was misconceived. The Respondent's refusal to indemnify is shown in the end to be a breach of the contract of Insurance. The Appellant did not contend for a breach by the Respondent of the contract of insurance, and in all the circumstances the duty on the Respondent that then arose was one to mitigate. But again there is no evidence that the failure to appear and test the damages claim would have resulted in a lower award far less no award at all. The evidence, had it been available, would have had to identify the extent to which the damages would have been reduced. Nothing approaching that degree of sophistication was advanced either at first instance or on appeal.

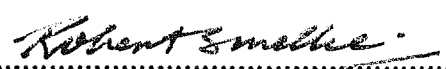
### **Result**

The Appellant is bound by the terms of the policy of Insurance to indemnify the Respondent. The appeal therefore fails.

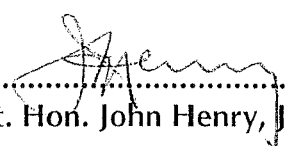
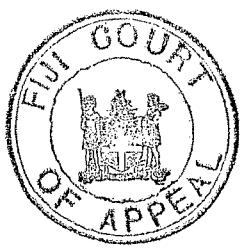
We award costs at \$1, 500.00 to the respondent together with disbursement as fixed by the Registrar if Counsel are unable to agree.



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Hon. Jai Ram Reddy, President



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Hon. Robert Smellie, Justice of Appeal



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Rt. Hon. John Henry, Justice of Appeal

Solicitors:

Messrs. Sherani and Company, Suva for the Appellant  
Messrs. Lateef and Lateef, Suva for the Respondent