IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0059 of 2011
(High Court Civil Action No. HBC 48 of 2008L)

BETWEEN : NEW INDIA ASSURANCE COMPANY LIMITED

Appellant

AND : G. P. REDDY & COMPANY LIMITED

Respondent

Coram : Chandra JA
Lecamwasam JA
Mutunayagam JA

Counsel : Mr. A. Narayan and Mr. K. Patel for the Appellant
Mr. V. M. Mishra for the Respondent

Date of Hearing : 25 November 2013

Date of Judgment : 5 March 2014

JUDGMENT

Chandra JA

[1] This is an appeal against the judgment of the High Court at Lautoka in respect of a claim made by the Respondent based on an insurance policy in respect of fire damage to its buildings and machinery.

[2] The Respondent in its statement of claim stated that it owned a commercial building at Navutu and had taken out an Insurance Policy from the Appellant in respect of the building, furniture and machinery against risks inter alia of fire. That a fire occurred on the 5th of May 2003 which completely destroyed the Respondent's building, furniture and machinery which building had been used as a showroom. The Appellant had refused the claim made by the Respondent and consequently the Respondent claimed the sum covered by the Insurance Policy, general damages, compensation, interest and costs of the action.

[3] The Appellant in its statement of defence admitted the existence of the Insurance Policy but denied liability as it alleged that the fire that occurred was deliberately set by the Respondent or persons acting on its behalf and made a counter-claim for sums expended in investigation in handling the claim made by the Respondent and costs on a solicitor/client/indemnity basis.

[4] The High Court gave judgment in favour of the Respondent and granted the following awards:

(a) The Defendant (Appellant) to pay the Respondent (Plaintiff) the sum of $261,932.00 being the amount covered under the fire policy for building, machinery and furniture;

(b) The Defendant to pay the plaintiff $20,000.00 as general damages;

(c) The Defendant to pay the plaintiff interest on $281,932.00 at 10% p.a. from 1 October 2005 to the date of judgment;

(d) The Defendant to pay the plaintiff $9,500.00 as costs;

(e) The plaintiff to pay the defendant $8010.00 and 10% interest calculated from 5 May 2002 to the date of judgment;

(f) The Defendant to pay the plaintiff the total sum of $281,932.00 at 10% p.a. from 1 October 2005 to the date of judgment after setting off the sum of $8010.00 and 10% interest calculated from 5 May 2002 to the date of judgment;

(g) All the above monies to be paid by the defendant on or before 30 November 2011. If the defendant fails to pay the full sum by 30 November 2011, the defendant to pay the plaintiff interest at the rate of 10% until the date the payment is made in full.

[5] The Appellant filed notice of appeal against the said judgment on the following grounds of appeal:

> *"1. The Learned Trial Judge failed to properly and or adequately consider all the evidence in making her determination that the fire had not been deliberately set on behalf of the Respondent in order to make a claim under the policy.*
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> *2. The Learned Trial Judge erred in law and in fact in finding in all the circumstances that although Mr Reddy had access to the keys to enter the showroom, he was not the only person who had such access to the key and failed to properly or adequately consider that the issue was whether Mr Reddy had the opportunity and motive as opposed to any other person set the fire.*
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> *3. The Learned Trial Judge failed to properly and/or adequately consider and evaluate all the evidence relating to motive in that the Learned Trial Judge's findings were based substantially on the evidence contained in the financial statements and the Respondents financial standing and not*

other factors such that her failures led to her erroneous conclusions in respect of opportunity against the Appellant.

4. The Learned Trial Judge's findings against Mr Reddy having a motive to set the fire to the showroom was in error and against the weight of the evidence.

5. The Learned Trial Judge erred in rejecting the evidence of Robert Cohen and preferring the evidence of Jay Lal as to the financial statements and further erred in placing the onus on the Appellant to prove that the incorrect information provided by Mr Reddy to Mr Jay Lal would not have had an adverse impact against the Respondent as to its financial status.

6. The Learned Trial Judge erred in not rejecting the financial statements prepared by Jay Lal as being unreliable and drawing adverse inferences against the Respondent.

7. The Learned Trial Judge erred in law and fact in not finding that the fire was a deliberate one in all the circumstances and in view of the evidence.

8. The Learned Trial Judge erred in law in rejecting the evidence of Mr Gary Luff as an expert as to the cause of the fire such rejection being based or influenced, inter alia, on her erroneous.

a. Interpretation and/or construction of the provisions of the Evidence Act 2002.

b. Evaluation of the evidence of Mr Gary Luff.

c. Failure to consider that the onus of proof does not remain fixed on a party throughout a witness's evidence on trial.

9. The Learned Trial Judge erred in law and in fact in finding that Respondent had not made false statements in support of the claim such that the Appellant was entitled to rely thereon to decline the claim.

10. The Learned Trial Judge erred in law and in fact in view of all the evidence in finding that the Appellant was in breach

of an implied term of the policy and thereby awarding the Respondent $20,000.00 by way of damages.

11. The Learned Trial Judge erred in law and in fact in not finding that the Respondent had been in breach of its obligation to provide assistance to the Appellant and further erred in not appreciating why documents relating to past sales were relevant.

12. The Learned Trial Judge erred in law and in fact in failing to distinguish between an indemnity policy and valued policy and thereby erred in failing to find that on the evidence the Respondent held an indemnity policy.

13. The Learned Trial Judge erred in law and in fact in failing to hold that the Plaintiff was only entitled to be indemnified for loss under the policy limited to the market value of the items insured at the time of the loss up to the maximum sums insured for each items of the loss claimed as a result of such failure the Learned Trial Judge fell into the further error of using the sums insured for each item under the policy of insurance as representing the market value of those items at the time of the loss.

14. The Learned Trial Judge failed to properly or adequately appreciate that the onus of proof of loss to support the Plaintiff's claim was on the Plaintiff and thereby erred in holding that the Plaintiff had proved its losses to the extents represented in her Judgment.

15. The Learned Trial Judge erred in law and in fact in finding that the Plaintiff had proved the market value of the building (showroom) at $200,000.00 in the absence of any valuation or other acceptable or credible evidence as to the market value of the building (showroom) at the time of the loss and failed to take into account or consider that the building did not and would not have a completion certificate from the Lautoka City Council and the impact this would have on the marketability or the market value of the building (showroom).

16. The Learned Trial Judge erred in law and in fact in finding that the Plaintiff had proved its loss for stock, furniture

or plant and machinery in the absence of any acceptable or credible evidence of the market value of those items at the time of the loss.

17. The Learned Trial Judge erred in law and in fact in finding that the Plaintiff had proved the market value of any of its alleged losses at the time of the fire and thus erred in making any award in respect of any of the insured items.

18. The Learned Trial Judge erred in law and in fact in not holding that the sums insured for the building and stock/furniture had been reduced after 18th November 2002, at the specific request of the Plaintiff such that the maximum sum insured for the building at the time of the loss was $100,000.00 and the stock /furniture $30,000.00 and thus the Learned Trial Judge erred in making an award exceeding the maximum sums insured under the policy.

19. The Learned Trial Judge erred in law and in fact in holding that Mr Naidu, an agent of the Appellant, did not have authority to bind the Appellant when he agreed to the reductions of the sums insured under the policy in all the circumstances and in view of the provisions of section 4(3) of the Insurance Act 1998.

20. The Learned Trial Judge erred in fact and in law in holding that the Appellant was stopped from arguing that the policy had been reduced in the circumstances where despite the pleadings the evidence of reduction was introduced by the Respondent and thereafter the Respondent was cross-examined and documents and other evidence was led without objection and was an issue identified by the parties and the Learned Trial Judge as calling for determination."

[6] When this appeal was taken up for hearing the Appellant had filed a summons seeking leave to amend the defence on the 21st of November 2013. Both parties were heard on this application first and thereafter heard both parties on the appeal filed by the Appellant. The decision regarding the application seeking leave to

amend the defence would be made along with the judgment of the Court regarding the Appeal of the Appellant.

Factual Matrix

[7] The Respondent had carried on business as a general timber merchant, manufacturer and retailer of furniture and hardware. Since 1992 the Respondent had insured the business with the Appellant and had several policies including a fire policy. The fire policy which had expired on 15 May 2002 had been renewed from 15 May 2002 to 15 May 2003 for a sum of $320,000.00. A fire had occurred on 5 May 2003 which completely destroyed the showroom along with the furniture and machinery. The Respondent had lodged a claim on 31 May 2003 with the Appellant which had been refused by the Appellant by letter dated 18th January 2006.

[8] The main basis of the refusal of the claim of the Respondent by the Appellant was that they alleged that the fire had been deliberately set by the Respondent or persons acting on its behalf with a view to obtaining a benefit under the policy.

[9] At the trial before the High Court, the Respondent led the evidence of four witnesses, namely Rokosiana Uru Qoro (alias Rocky), Ganapathy Reddy – The main shareholder of the Plaintiff's Company, Sathendra Prasad – Security Guard of the Plaintiff and Jay Lal – Accountant of the Plaintiff. The Appellant led the evidence of seven witnesses, namely Robert Cohen – Accountant, Rupesh Chandra – Staff of Credit Corporation, Albert Raj – Sales Officer of the Respondent, Umesh Kumar alias Pillu the Operations Manager of MYT Transport, Ms. Mohini Ali – Staff of Appellant, D.S.Naidu- Insurance Agent and Garry John Luff – Fire Investigator.

[10] The fire had broken out around 5.20 p.m. on 5 May 2003 and Rocky the Security Guard of MYT Transport had first seen the fire and alerted Umesh Kumar (Pillu) and Sathendra Prasad the security guard of the Respondent. Just before the fire Albert Raj the sales Manager of the Respondent had as usual locked up the showroom around 5 p.m. and hung the key in the office and had left the premises. Sathendra Prasad had then closed the gate around 5 p.m. Mr. Reddy, the Managing Director of the Respondent Company who was the alleged perpetrator of the fire according to the Appellant, had left around 5.15p.m and when he was shopping in Lautoka had been informed by Pillu of the fire. The fire brigade had been called, but the fire had gutted the showroom to ashes. The Police had carried out an investigation but no criminal action had been filed against anyone.

[11] The Respondent had lodged its claim on 31 May 2003. On receiving the claim of the Respondent, the Appellant had appointed Mr. Luff a fire investigator to investigate and KPMG to advise on the financial status of the Respondent. Mr. Luff had carried out his investigations and on 18 January 2006 the Appellant through its lawyers sent a letter declining the claim and alleging fraud on the basis that Mr. Luff was of the opinion that the fire was not accidental but deliberately ignited by Mr. Reddy, as he was in financial difficulties.

Consideration of the Grounds of Appeal

[12] Grounds 1 to 9 cited above relate to the findings of the learned High Court Judge on facts and would be dealt with together.

[13] Both parties have made their submissions regarding the manner in which the Appellate Court should consider the findings of the learned High Court Judge on facts and have cited more or less the same authorities regarding same. The Supreme

Court of Fiji in **QBE Insurance (Fiji) Limited –v- Ravinesh Prasad** Supreme Court Civil Appeal No.CBV 003 of 2009 which dealt with a case relating to an insurance claim stated:

> *"27. This is a case where the trial judge had the advantage of hearing and seeing the witnesses examined and cross-examined. It is not a case depending on inference to be draw from admitted evidence. While there are many leading cases of high authority on the point, in my opinion, the words of Lord Reid in the House of Lords in* ***Benmax –v- Austin Motor Company Ltd*** *(1955) 1AA ER326 at 328 and 329 are the most applicable to the present case and the judgment .....*
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> > *"Apart from the cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard from the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimize the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations."*

[14] The contention of the Appellant is that the fire which caused the damage was deliberate and not accidental and alleged that it was Mr. Reddy who would have caused it or got some other person to cause it. The burden was on the Appellant to establish this position. There was no direct evidence regarding the cause of the fire. It was only circumstantial evidence that was available to determine whether the fire was deliberately caused or accidental.

[15] The Appellant in their submissions state that they had adduced evidence in Court that clearly showed that there could not have been any accidental fires and that the only cause for the fire was a deliberate one. In support of this position the following has been stated in the said submissions in relation to the evidence of the several witnesses:

1. *Albert Raj in his evidence said that there was no electrical problems with the building. According to him all the lights were working properly and the power points and all the appliances were all switched off before he left.*
2. *Umend Kumar was aware that the electrical wire supplied power to the showroom. He did not see any electrical shorting to the electrical wire that was supplying the power. He had only seen the flames from the corner of the building burn the wire.*
3. *The evidence of Mr. Gary Luff excludes electrical or accidental fire.*
4. *Mr. Reddy in his evidence said that neither he nor Albert Raj smoked.*
5. *The yard was fully fenced under the supervision of two security guards. There had not been any previous break in to the premises.*
6. *Mr. Reddy himself ruled out any electrical problem and had no idea how the fire started.*

7. *Umend Kumar in his evidence said that he did not see anyone else visit the yard between 5 o'clock and the time of fire.*

[16] The learned trial Judge had considered all these matters when she arrived at the conclusion that the fire was not deliberately caused as alleged by the Appellant. If the above items were to be considered objectively it would be a difficult exercise to arrive at the conclusion different from the one arrived at by the learned trial Judge. Does the mere fact that no electrical problems had been observed by Albert Raj draw an inference that there cannot be an accidental fire? Likewise could the fact that Umend Kumar did not see any electrical shorting draw an inference that there was no accidental fire. Can Mr. Gary Luff's conclusion the fire investigator hired by the Appellant be conclusive on the matter. In effect although Mr. Luff had quite a wide experience in investigating fire damage there had been cases where his conclusions had not been accepted by Courts as for instance, in the case of **Punja and Sons Ltd –v- New India Assurance Company Ltd** 2011 FJHC 252; HBC435.2005 (6 May 2011) where the conclusions drawn by him were pointed out as being inconsistent with the evidence that was available. Mr. Luff's views could only be considered as an opinion regarding which the report that was given by him was not produced in Court and thereby the Court did not have the benefit of looking at the entirety of the report. Do the facts that Mr. Reddy and Albert Raj being non smokers, and Mr. Reddy ruling out any electrical problem and not having any idea as to how the fire occurred draw the inference that the fire was deliberately caused? Does the fact that Umend Kumar stating that he did not see anyone visiting the yard between 5 o'clock and the fire draw an inference that the fire was not accidental especially in view of the evidence that Mr. Reddy had been seen leaving the premises soon after Albert Raj had locked up the premises and was not present when the occurrence of the fire was observed? Do these matters taken as a whole enable the inference to be drawn that the fire was a deliberately lit fire?

[17] The learned trial Judge had in her judgment carefully analysed the evidence of each of the witnesses and considered the evidence as a whole which dealt with the above matters pointed out by the Appellant in their submissions in arriving at her conclusion that the fire was not caused deliberately. The learned trial Judge in her notes after the evidence of Mr. Reddy's evidence had noted that Mr. Reddy was a credible witness. The Appellant has taken up the position that the learned trial Judge had pre-judged the case when she had made that note soon after Mr. Reddy had concluded his evidence as she had not made similar notes regarding the evidence of the other witnesses. It is at the discretion of the trial Judge to make notes regarding any item of evidence or regarding any witness and the fact that no notes had been made regarding the other witnesses evidence cannot be faulted as the learned Judge had analysed the entirety of the evidence in her judgment.

[18] The Appellant has also submitted that the trial Judge did not make a finding based on demeanour but a perusal of the judgment reveals the contrary. The learned Judge in her judgment has commented on the background, education of the witnesses and the time that had lapsed and the manner in which the witnesses had given evidence and as to how they gave evidence. In the judgment the credibility of the witnesses has been specifically dealt with exhaustively from paragraphs [68] to [88]. In relation to Mr. Reddy the learned Judge stated:

> *"[148] I found Mr. Reddy as a witness to be honest and truthful. I did not find any attempt on his part to concoct false evidence. He readily answered as best he could. I observed that whilst Mr. Reddy understood English, he had a limited vocabulary in English like most other lay witnesses who gave evidence in this case. I observed at times that he had difficulty in expressing what he intended to say, i.e. he struggled to find the correct words to express in English. At times, I sought clarifications from the witness to fully understand his evidenced, which he readily provided. His testimony was consistent and his demeanour and the manner in which he testified amply indicated the reliability*

and truthfulness of his evidence, I find Mr. Reddy (PW-2) to be a credible witness."

[19] The Appellant has submitted that Mr. Reddy had the opportunity and the motive to set fire to the showroom in that he was in financial difficulty. As regards opportunity, the evidence was that Mr. Reddy had left the showroom after Albert Raj had locked it. He had been seen outside in the premises while his car was being washed. He was not present when the fire was detected. Dealing with this aspect the learned Judge stated as follows:

"[130] Let me now consider whether the circumstantial evidence before this court permits me to conclude that Mr. Reddy in fact ignited the fire. Mr. Reddy, Albert Raj and security guard Sathendra Prasad and some staff of MYT Transport were present at the premises just before the fire. The premises is secured with a barbed wire fence and the entrance is secured with a security post. The showroom only had one entrance, which was pad-locked by Albert Raj around 5 p.m. The defence especially excludes Albert Raj setting the fire.

[131] In my mind, the unchallenged evidence of Mr. Sathendra Prasad, the security guard of the plaintiff is important to determine the probability of Mr. Reddy to be the arsonist. In his evidence, Mr. Prasad said he saw Albert Raj locking the showroom and leaving the premises soon after 5 p.m. or so. Mr. Reddy then asked him to wash his vehicle and he saw Mr. Reddy standing on the veranda until he poured 2 or 3 buckets of water on the vehicle. Mr. Reddy had then left the premises. I do not have any reason to disbelieve the evidence of Sathendra Prasad, as I am convinced of his credibility.

[132] Had Mr. Reddy ignited the showroom, then it must necessarily have to be planned plot and could not have been a spur of the moment sudden decision. If Mr. Reddy plotted the

plan I am unable to accept that he would have left a gap of about 10 minutes to sneak into the showroom without being spotted by security guards and the other staff that were working in the premises, unlock the showroom, then ignite the fire, once again lock up the showroom and leave without being noticed, request the car to be washed and standing in the verandah until it was washed and then leave. In my mind, these items of circumstantial evidence are unlikely occurrences for me to infer Mr. Reddy carried out all of the above acts within 10 minutes.

[132] I have considered the evidence of all the witnesses at length, especially Mr. Luff. I have set out my reasons as why I cannot accept the opinion of Mr. Luff as an expert witness or even as a non-expert witness under section 15(2) of the Civil Evidence Act, 2002. Independent to Mr. Luff's opinion, I considered the circumstantial evidence adduced before me and concluded that the circumstantial evidence do not permit me to determine Mr. Reddy to be the arsonist. I am not persuaded that the defendant had proved on a balance of probabilities that Mr. Reddy committed arson. Accordingly, I conclude that Mr. Reddy did not cause the fire and dismiss this issue."

[20] As regards the fact that Mr. Reddy had the motive to set fire, the Appellant relied on the submission that the Mr. Reddy was in financial difficulties and that the evidence before Court was sufficient to conclude so. The learned Judge dealt with this question exhaustively by considering the evidence of Mr. Jay Lal, who gave evidence regarding the financial position on behalf of the Respondent and Mr. Cohen on behalf of the Appellant and arriving at her conclusion. The learned Judge stated:

"[58] It is clear from an examination of the bank statements, insurance premiums and Credit Corporation accounts that the plaintiff had paid up in full all these accounts by 2005, despite not being indemnified under the fire policy. This permits me to safely infer that the income from the sawmill although not regular

was sufficient for him to make ends meet, which he demonstrated by honouring all the payments to most of the creditors. In this context, it is also clear that the forecast of Mr Cohen that the plaintiff company was unable to meet its debts and liabilities and was on the verge of bankruptcy has no merit. The furniture business would in any event take time to generate income, as he would first have to manufacture the goods and maintain a reasonable stock before commencing marketing and sales. Mr Reddy said that the wood required for the furniture business came from the sawmill, thereby minimizing his expenditure in purchasing wood and ancillary items required for furniture making were marginal.

[59] I also note that a cheque payment made on 5 May 2003, on the day of the fire for $1000 by Mr Reddy was dishonoured. Ms Mohini Ali confirmed that Mr Reddy called her in the morning of the fire and sent cash, which is also confirmed by document D4 (1). Just two months prior to the fire, Mr Illango of New India had reinstated the policies on 10 March 2003, which had earlier been cancelled. Admittedly, the plaintiff was severely warned before the reinstatement of the policies relating to his payments. Had Mr Reddy planned to commit arson in order to benefit under the fire policy, he would, in all probability, have at least ensured that his fire policy was paid up to date and not tendered a cheque that would be dishonoured on the very day he planned to commit the arson and risk cancellation of the policy. Furthermore, Mr Reddy had secured a new contract with FSC in April 2003 to supply logs. Over 65% of his stock was also destroyed by fire where the plaintiff had to meet the contract in hand. In the absence of compelling evidence, I find that Mr Reddy's prior conduct is not consistent with that of a person intending to act as an arsonist as alleged by the defendant.

[60] Having carefully considered the evidence before me, I am not persuaded that Mr Reddy was motivated to commit arson because of his financial difficulty."

[21] The Appellant has submitted that the learned Judge erred when stating at paragraph [58] quoted above, that Mr. Reddy was able to make the payments not through the earnings of the sawmills but from the rentals that he received during that time. Even

if that were so, that shows that Mr. Reddy was able to honour his obligations towards the Bank and furthermore it was in evidence that there was sufficient security provided by Mr. Reddy when obtaining the facilities from the Bank. These factors again would show that Mr. Reddy even if he had gone through a lean period regarding his finances was not in a financial crisis as alleged by the Appellant regarding which the learned Judge concluded that he was not in a financial crisis.

[22] In Goodrich Aerospace Pty Limited –v- Dusan Arsic (2006) NSWCA 187 Ipp JA stated in relation to giving adequate reasons for demaeanour findings:

> "28. *It is not appropriate for a trial judge merely to set out the evidence adduced by one side, then the evidence adduced by another, and then assert that having seen and heard the witnesses he or she prefers or believes the evidence of the one and not the other. If that were to be the law, many cases could be resolved at the evidence simply by the judge saying:"I believe Mr.X but not Mr.Y and judgment follows accordingly". That is not the way in which our legal system operates. ……..*
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> *29. Often important issues of credibility involve sub-issues. Often, objective facts, or facts that are probable, are capable of having significant bearing on the sub-issues. In cases of this kind, it is incumbent upon trial judges to resolve the sub-issues and to explain, by reference to the relevant facts, the conclusions to which they have come. This having been done, they should then turn to the ultimate facts in issue and explain their decisions on the sub-issues have assisted them in forming a conclusion on the ultimate issue. It is only when adequate reasons of this kind are given that an unsuccessful party will be able to understand why the judge has believed his or her successful opponent."*

[23] According to Ipp JA credibility would involve the consideration of sub-issues. In the present case the credibility of Mr. Reddy was in issue as the Appellant had alleged that it was he who had set fire to the showroom as he had the opportunity and the

motive to do so as he was in financial difficulties. The governing factor therefore would be the question of whether Mr. Reddy set fire to the showroom and the sub-issues would be the opportunity and the motive that he would have had. As discussed in paragraphs 20 and 21 above the learned Judge had adequately dealt with the sub-issues in arriving at the conclusion that Mr. Reddy did not set fire to the showroom as he was treated as a credible witness and the learned Judge was also satisfied with his demeanour as stated in her judgment.

[24] The Appellant has relied heavily on the evidence of Mr. Luff, the fire-investigator who was called in by them. It is rather unfortunate that the Appellant did not produce the report that he had given to them, for reasons best know to the Appellant, wherein he had arrived at the conclusion that it was Mr. Reddy who had set fire to the showroom. There was only his evidence which had to be considered by Court. The submission was also made that the learned Judge did not consider Mr. Luff as an expert. When Mr. Luff commenced his evidence the Respondent's Counsel had objected to his evidence being led as an expert for want of disclosure. The learned Judge after consideration of same refused to admit Mr. Luff's oral testimony as expert evidence under section 15(1) of the Civil Evidence Act 2002 in the absence of the expert report before court for its examination and for want of disclosure and adequate notice which decision cannot be faulted.

[25] Although the learned Judge did not consider the evidence of Mr. Luff as expert evidence, she nevertheless considered his evidence in detail and concluded that she was unable to accept his opinions given at the hearing which she reasoned out in

the judgment from paragraphs [111] to [124] and it would be sufficient to quote the concluding paragraphs:

> *"[123] To me just oral evidence of Mr. Luff stating that he has hands on experience with over 2300 investigations will not suffice to determine whether he in fact possessed sufficient skills and knowledge to have excluded 'electrical fault' as a possible cause of the fire. His pertinacity that he is an expert to determine origin of fire does not qualify him automatically to be an expert on 'electrical' causes. Nor has Mr. Luff supported his conclusions with acceptable evidence. The fact that Mr. Luff is an expert by itself does not make his evidence reliable on the specific subject. Even if court accepts a witness as an expert, the expert is still required to substantiate his findings, by demonstrating the methodology followed, the evidence supporting his conclusions etc. Mr. Luff has failed to substantiate his findings before court. In the circumstances, I conclude that Mr. Luff had not submitted adequate evidence before this court to determine his skills and knowledge as an expert to express an opinion that the fire did not originate from an electrical fault.*
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> *[124] Mr. Luff at the hearing confirmed that he handed over the report to Mr. Narayan's office. The defendant did not handover a copy to the plaintiff. I am of the view that it is safe for me to infer that the report contained material that was adverse to the defendant's case or favourable to the plaintiff and therefore the defendant did not produce it in court."*

[26] Having concluded that Mr. Luff's evidence could not be accepted as expert evidence, the learned Judge then went on to consider whether his evidence could be admitted under section 15(2) of the Civil Evidence Act 2002. The learned Judge arrived at the conclusion that Mr. Luff's conclusion amounted to a statement which was bordering on inference, unsubstantiated by facts. This conclusion of the learned Judge cannot be faulted as all relevant material regarding the evidence of Mr. Luff had been considered in arriving at that conclusion.

[27] The Appellant also took strong ground alleging that Mr. Reddy had made two false statements to Mr.Luff when he was interviewed and that the learned Judge had erred in her reasoning that they were not so. They were:

> *"Q. As at the date of the fire, would you describe the company as being in a strong financial position?*
> *A. Yeah, the company was dealing with Bank of Baroda and our arrangement is there for certain limits....Plus long term loan so that was not a problem with the company.*
> *Q. So has Credit Corporation ever written to you or put pressure on you to bring a loan into order?*
> *A. No, in fact we normally talk.....Like that's what I am saying if any the loan difference I make it up one month on."*

[28] The learned Judge dealt with both statements specifically in her judgment at paragraphs [134] to [148]. At paragraph [142] the learned Judge stated:

> *"[142] I have already concluded that I am convinced that the plaintiff was in some financial difficulty. However, I am unable to accept that the above answer can be considered to be a false statement. The question is subjective and the answer is equally subjective. I understand Mr. Reddy's answer to Mr. Luff's question to be a statement to the effect that when he was in arrears he liased with the Bank of Baroda and that certain financial facilities were made available to him by the bank and hence the financial matters were under control. I do not find any element of falsehood in the statement and I am unable to consider Mr. Reddy's answer to be a false statement."*

[29] As regards the second question after dealing with same in paragraphs at paragraphs [143] to [146] concluded at paragraph [147]:

> *"[147] I find that the spontaneous answer of Mr.Reddy to Mr.Luff's question to be a statement to the effect that*

Mr.Reddy had discussed and sorted the matter whenever there was an issue of arrears of payment with CCF (Credit Corporation Fiji). I am thus unable to find any false element in the answer. I do not find his statement to have been made with the motive of concealing that the CCF communicated with him with respect to arrears, either. I dismiss this defence."

[30] The learned Judge therefore had considered the two statements which were alleged by the Appellant to be false statements had considered them in the light of the evidence relating to same and held in favour of the Respondent. These specific conclusions were in addition to the learned Judge's conclusion regarding the evidence of Mr. Reddy as set out above at paragraph [18] of this judgment.

[31] Ground 10 of the appeal is as regards the award of $20,000.00 as damages on the ground that the Appellant was in breach of an implied term of the policy.

[32] The Respondent had made its claim on 31st May 2003. The Appellant had taken one and a half years to process the claim after all the documents had been handed over to the Appellant on 30 August 2004. It is a well established practice that an insurance claim is either declined or indemnified within a reasonable time. FAI Insurance (Fiji) Limited v. Prasad's Nationwide Transport Express Courier Limited [2008] FJCA 101. Clause 12 of the policy sets out that the insurer would not be liable for any claims after one year of the damage or destruction. Taking into account the fact that the Appellant had taken one and a half years from the date of furnishing the documents to decide on the claim of the Respondent regarding, the learned Judge considered the taking of such a period was unreasonable and held that the Appellant did not process the claim swiftly which deprived the Respondent from obtaining the financial benefits it was entitled under the policy. It is on that basis that the Judge held that there was a breach of the implied condition under the

policy in failing to swiftly evaluate the claim within a reasonable time. Therefore the granting of damages in a sum of $20,000.00 cannot be faulted.

[33] Appeal ground 11 was to the effect that the Respondent had failed to assist the Appellant in terms of Clause 6 of the policy. The contention of the Appellant was that the Respondent had failed to furnish certain information such as receipts for sale of furniture locally, purchase documents associated with the manufacture of furniture and sales which were required by Mr. Luff and as a result failed to assist the Appellant. It was also stated that it was possible that the documents may have got burnt in the fire but even if it had happened in that way that the Respondent should have obtained copies from suppliers and others and furnished same. If there was a lapse on the part of the Respondent as alleged, it would have only affected the quantum of the damage that the Respondent was claiming and would not have affected the entirety of the claim. Therefore this ground has no merit.

[34] Grounds 12 to 17 were on the basis of the nature of the claim of the Respondent and the assessment of the loss and as to the manner they were considered by the learned trial Judge.

[35] The claim of the Respondent being an insurance claim the usual principles relating to indemnity would apply and the liability of the insurer would be limited to the sum insured based on the actual loss. In dealing with such a loss it is the market value of the property that is taken into account. Roumeli Food Stores NSW Pty Ltd v. The New Indian Assurance Co Ltd (1972) 1 NSWLR 227.

[36] In Leppard v. Excess Insurance Co. Ltd (1979) 2ALL ER 6668, Megaw L.J. stated :

> *"Ever since the decision of this Court in CASTELLAIN v PRESTON, the general principle has been beyond dispute. Indeed, I think it was beyond dispute long before CASTELLAIN v PRESTON. The insured may recover his actual loss, subject of course to any provision in the policy as to the maximum amount recoverable. The insured may not recover more than his actual loss." As it was put by Brett L.J. in CASTELLAIN v PRESTON at page 673:*
>
> > *"In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation in my opinion, of every rule which has been applied to insurance law is this, namely that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, because of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say which either will prevent the assured from obtaining a full indemnity, that proposition must certainly be wrong."*

[37] The Appellant in their submissions sought to argue that the learned Judge erred in failing to distinguish between an indemnity policy and a valued policy and erred in failing to find that on the evidence the Respondent held an indemnity policy. This would be a fallacious argument as the learned Judge treated the policy as an indemnity policy and in her judgment cited the above principles in dealing with same.

[38] The Respondent had claimed $200,000.00 for the building which was completely destroyed. This sum had been included in the claim form submitted through the Agent of the Appellant Mr. Naidu who apparent did not have to skill to value the building. Mr. Reddy was cross-examined at length on this question of value of he building which was newly constructed which was completed destroyed. The Appellant had not followed the usual practice of getting a Loss Adjustor to assess the loss which Insurers usually do when assessing a claim. If such a step was taken the loss could have been easily evaluated and would have assisted Court in arriving at the loss. The Respondent had placed evidence before Court in the form of the cost incurred in putting up the building and the valuation given to the Lautoka City Council which the learned Judge had made use of in assessing the loss and arrived at the figure of $200,000.00 specially in view of the fact that it was a new building and therefore the market value would have been about the same as valued by the Respondent. It is to be noted that for the purposes of issuing the Policy to the Respondent the Appellant had accepted the value of $200,000.00 for the building. In those circumstances, the finding of the learned Judge cannot be faulted in relation to the manner of dealing with the claim and assessing the loss.

[39] As regards the claim of the Respondent regarding furniture learned Judge had considered the market value of the furniture as set out in the financial statements furnished by the Respondent. In respect of the machinery that was destroyed, the depreciated value of the machinery had been taken into account in arriving at the loss regarding machinery. The finding of the learned Judge in relation to the loss in relation to furniture and machinery was according to the evidence and the conclusion arrived at regarding the loss is in accordance with the legal principles.

[40] Grounds 18 to 20 of the Appellants appeal dealt with the alleged reduction of the sum insured. It was the submission of the Appellant that the sum insured was not

$320.000.00 as stated by the Respondent and that it had been reduced when the Policy was renewed. Although the Appellant had not denied the sum of $320,000.00 in their statement of defence, in the course of the trial they sought to establish that the insured sum had been reduced at the request of the Respondent. It was also in evidence that the Appellant had not issued an endorsement regarding the reduction of the premium.

[41] The learned trial Judge dealt with this issue at length in her judgment from paragraphs [19] to [40] and concluded that the extent of the cover was $320,000.00 regarding which she also held that the Respondent had to pay the balance premium of $8010.00 as being a sum which was outstanding.

[42] The basis of the learned trial Judge's conclusion was a consideration of all the items of evidence regarding the insured sum as led by both parties. The Judge also took into consideration the fact that the Appellant had not returned the post dated cheques issued by the Respondent which were on the basis of the original premium. The learned Judge also considered the effect of Order18 rule 12 of the High Court Rules, 1988 as the Appellant had not pleaded this issue. It was a further fact that the Appellant had not raised any issue regarding the reduction of the insured sum even at the pre-trial conference.

[43] As the learned trial Judge had dealt with the issue of reduction of the sum insured sum according to the pleadings, evidence and the applicable law grounds 18 to 20 have no merit.

[44] The Appellant as stated in paragraph [6] of this judgment sought leave to amend the statement of defence at the appeal stage. The amendment sought to deal with the reduction of the sum insured which issued when raised by them in the High Court failed as stated in paragraphs 40 to 43. It is another attempt to bring up the same issue before the Appellate Court.

[45] The Appellant has cited the Supreme Court decision in **Kala Wati & Ors v. S. L. Shankar Limited and Another** Civil Appeal No.,CBV003 of 2008S 17th October 2008 in support of their contention that an application can be made at the appeal stage to amend the statement of defence. That was a case dealing with contributory negligence where the liability was determined and the amendment related to contribution among tortfeasors and quite distinguishable from the facts in the present case. The judgment in this case was given by the High Court on 31 October 2011and the summons seeking leave to amend the statement of defence was filed on 25th November 2013 which was after both parties had filed their written submissions. Apparently the step taken by the Appellant is as an afterthought as they had failed to raise this issue in their original pleadings and in the issues at the pre-trial conference and further their challenging the quantum of the sum insured having failed at the trial. The learned Judge as stated earlier had gone into these questions and dealt with same. It would therefore be inappropriate to allow the application of the Appellant at this stage.

[46] A somewhat similar situation had arisen in the Court of Appeal in **Manubhai Industries Limited and Another v. Lautoka Land Development (Fiji) Limited** Civil Appeal No.ABU0043 of 1998S 25 February 2002. In relation to the second

respondent's application for amendment to plead contributory negligence it was held that:

> *"With significant encouragement from one member of the court Mr. Calanchini applied during the course of his submissions on behalf of the second respondent for leave to amend the second respondent's pleadings to allege contributory negligence on the part of the appellant in the event that the second respondent was found liable in negligence. Upon reflection, however, the court is of the firm view that the application should be refused. The appellants pleaded precise particulars of negligence against the second respondent in its statement of defence to the appellant's statements of claim. Had an application to raise contributory negligence by way of amendment been made during the course of the trial in the High Court it may well have been allowed. But at this late stage, (over five years after the second respondent's amended statement of defence was filed), to grant such an indulgence would be unjust to the appellants."*

[47] In the present case the statement of defence was filed on 23rd April 2008 and it has taken more than five years for the Appellant to seek leave to amend the statement of defence. It would be unjust to allow such an amendment and therefore the application of the Appellant seeking leave to amend the statement of defence is refused.

[48] The appeal of the Appellant is dismissed with costs fixed at $4000.00.

Lecamwasam JA

[49] I agree with the reasons and the conclusions of Chandra JA.

Mutunayagam JA

[50] I also agree with the reasons and the conclusions of Chandra JA.

Hon. Justice S Chandra
JUSTICE OF APPEAL

Hon. Justice S Lecamwasam
JUSTICE OF APPEAL

Hon. Justice A B Mutunayagam
JUSTICE OF APPEAL