IN THE COURT OF APPEAL
APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU 22 of 2012
(High Court HBC 29 of 2003)

BETWEEN : **NEW INDIA ASSURANCE COMPANY LIMITED**

Appellant

AND : **GURBACHANS FOODTOWN LIMITED**

Respondent

Coram : **Calanchini P**
Lecamwasam JA
Almeida Guneratne JA

Counsel : **Mr. A. K. Narayan for the Appellant**
Mr. H. K. Nagin for the Respondent

Date of Hearing : **16 November 2015**

Date of Judgment : **3 December 2015**

JUDGMENT

Calanchini P

[1] I have had the opportunity of reading in draft the judgment of Guneratne JA and I agree with His Lordship's conclusions and reasons.

Lecamwasam JA

[2] I agree with the views expressed by Guneratne JA.

Almeida Guneratne JA

A Brief Account of the Material Facts

[3] On the basis of two insurance policies, the plaintiff respondent (hereinafter referred to as the Respondent) claimed damages caused to its goods and equipment by heavy winds and heavy rain that occurred in Labasa in the year 2003.

[4] The defendant-appellant (the insurance company and hereinafter referred to as the Appellant) took exception to that claim on the ground that the damage had been caused by 'floods' which was excluded specifically under the two policies.

The Pleadings

[5] The action originated by way of a writ of summons. The statement of claim is at pages 23-30 of the Record of the High Court (RHC), the Amended Statement of Defence at pages 35 – 38 thereof and the Reply to the Amended Statement of Defence at pages 39 – 41.

[6] The High Court by its judgment dated 23rd March 2012 (corrected later to 29th March) allowed the claim on the basis that, the damage was caused by a cyclone, (Cyclone Ami), equating 'a cyclone' to 'heavy winds and heavy rains'. (The Judgment is at pages 5 - 20 of the RHC).

Grounds of Appeal

[7] The grounds of appeal are set out in paragraphs [1] to [7] of the Notice of Appeal dated 20th April 2012 (vide: pp.2 – 3) of the RHC) which may be recounted as follows:

"1. *The Learned Trial Judge erroneously construed the issues calling for determination as being to hear 'as a preliminary issue the case of the peril' when there was no such request made.*

2. *The Learned Trial Judge failed to properly consider and/or apply the relevant principles of law as to the determination of the question what was the proximate cause of the damage to the Respondents goods.*

3. *The Learned Trial Judge erred in law and in fact in not holding that the proximate cause of the Respondents loss under both policies of insurance was flooding and thus an excluded event or alternatively if there were two concurrent causes cyclone and flood, the loss was excluded by virtue of the policy terms.*

4. *The Learned Trial Judge failed to properly interpret and apply the exclusion for damage caused by water and her decision was contrary to the evidence and in the absence of evidence of any damage having been caused by water entering the building through openings in the walls or roof made by the storm or tempest.*

5. *The Learned Trial Judge misconstrued the policies and/or acted contrary to evidence and/or in the absence of evidence in holding that:*

    i) *it was the ground floor that was insured under the policy.*
    ii) *the defendant knew at the time of extending the policy that the insured property did not have a roof.*
    iii) *I am unable to give the same construction to a premises situated on the ground floor.*

6. *The learned trial Judge erred in law in the course of her interpretation of exclusion clauses in respect of policy number 922625/1111/06913/2001 in requiring the Defendant to cross-examine the Plaintiff as to his understanding of the special condition or to address evidence to establish this when such evidence is inadmissible as a matter of law for the purposes of interpretation or construction of terms of an agreement/contract.*

7. *The Learned Trial Judge erred in law and in fact in applying the contra proferentum rule of construction in respect of policy number 922625/06913/2001 when*

    a) *there was no ambiguity in the terms used and/or*

b) *when there was a reasonable construction of the relevant clauses such as to render the said rule of construction inapplicable ; and/or*

c) *the learned trial Judge in effect applied the rule as one of first resort; and/or*

d) *the said rule of construction was not applicable in all the circumstances; and/or*

e) *the learned trial Judge applied the said rule of construction when it was not an issue the Court had to determine nor had the Court or the Respondents given any notice to the Appellant that this was made an issue and did not call upon the Appellant to address her on the issue."*

What the pleadings reveal

[8] A brief dissection of the pleadings reveals that the principal fire policy dated 4th July, 2002 (which I shall label as 'X' for the purposes of this appeal) had been extended to cover storm and/or tempest. It was further extended by a renewal certificate to cover 'hurricane' and water damage (due to burst pipes). The second policy dated 1st July, 2003 (which I shall label as 'Y' for the purposes of this appeal) was extended to cover a fire and other listed perils including cyclone and excluding flood.

Extension Clause
The Relevant Clauses in the two policies

[9] Policy 'X'

"In consideration of the payment by the Insured to the Company of an additional premium it is hereby agreed and declared that the insurance under the policy, shall be subject to the special condition hereinafter contained extend to include destruction of or damages to the property insured caused by storm and/or tempest".

(b) "No claim will be admitted in respect of

(i) loss or damage to the insured interest by water or rain unless such loss or damage is caused by water or rain entering the building through openings in the walls or roofs made by storm and/or tempest.

(ii) loss or damage caused by sea, tidal wave, high water, flood, erosion, subsidence or landslide."

Policy 'Y'

"Endorsements

Extension Clause

fire and other perils including cyclone and excluding flood."

[10] As revealed from the two policies and the pleadings the central issue for determination was whether the damage to the goods of the plaintiff had been caused due to a 'cyclone' or on account of 'flood', which to my mind stood largely as a question of fact mixed however as a question of law since a matter of interpretation was involved as to where a line was required to be drawn between 'a cyclone' and 'flood'.

The Evidence

[11] The Respondent called three witnesses. Charan Jeath Singh, the Managing Director of the Respondent said that the insured property is situated on the ground floor of a two-storeyed building which was a supermarket. He said that the cyclone caused damage to his stock and equipment. Labasa had always been a flood prone area but the type of flooding he saw during 'Cyclone Ami' was his first experience despite living there his entire life. In cross-examination he admitted that the river in Labasa is a tidal river, where the water level rose considerably due to heavy rain, brought about by the cyclone and that during the cyclone the river broke its banks and water overflowed and flooded the town. The water from the floods then seeped into the building through the gaps under the doors thereby damaging the stock and equipment. The witness also admitted that the building did not suffer any damage caused by wind in the cyclone and the roof and other fixtures of the building remained in tact. (The witness's evidence is at pages 1and 2 of the Supplementary RHC repeated at pages 7 and 8).

[12] Ravind Kumar, a Senior Scientific Officer of the Meteorological Service of over twenty three years experience, in his examination in chief and cross-examination held the view that the heavy rain brought about by Cyclone Ami was the cause of flooding while qualifying his view in saying that it is the Hydrology department that could best determine the cause of flooding. However he identified four contributing factors for the flooding namely,

(i) heavy rain fall brought about by the cyclone

(ii) exceptional high tide which the Labasa river was prone to

(iii) the piling of water through storm and sea surges along the coastal area, and

(iv) low pressure depression preceding the cyclone.

(the witness's evidence is at pages 3 and 4 of the Supplementary RHC repeated at pages 9 to 10).

[13] Hemant Kumar Charan of the Hydrology department with thirty four years experience did not add much to the evidence of the other two witnesses. He had not prepared the report titled "The Exceptional Flooding on Vanua Levu Island, Fiji, during Tropical Cyclone Ami in January, 2003", nor had he conducted any research relating to Cyclone Ami although confirming that the report was prepared by his office. He admitted the contents thereof *inter alia* that the flooding was due to the heavy rain brought about by the said cyclone. (The witness's evidence is found at pages 5 to 6 of the Supplementary RHC repeated at pages 10 to 12).

[14] The following excerpts (contained in two parts) to which the witness deposed may be reproduced at this point (which were marked and produced as Exhibits 4 and 17 of the Agreed Bundle of Documents (ADB). The Report stated:

> *"TC Ami rapidly developed into an intense system with very destructive hurricane force winds. Its track passed across the large, well populated island of Vanua Levu in Northern Fiji. Resulting destruction was extensive and*

several due to the high wind, heavy seas and torrential rainfall."

[15] The said reports further noted thus:

"Massive waves and strong storm surges led to both coastal and inland inundation in many areas along Ami's path. Deep flooding in Labasa on Vanua Levu had severe effects on the town's population ... Torrential rain led to many valley slopes falling in landslides, and on low lying flood plains huge quantities of sediment deposited by the swollen rivers ruined many sugar cane farms.
(Item 3)

In item 5 the reports continued thus:-
During Tropical Cyclone Ami in mid-January 2003 very large rainfalls occurred. The mountainous terrain of the island rapidly transferred this moisture to river channels producing record breaking floods in 5 of 8 rivers for which long term hydrological information exists. Nasekawa River had an extreme peak flow exceeding 6100 cubic metres/s. In the Labasa area, 3 rivers simultaneously delivered large amounts of water to the same coastal hinterland, at the time there was cyclone-generated storm surge. This produced flood heights of more than 4 meters on some flood plains.

Ami was a relatively intense tropical cyclone with maximum (10 minute) average winds of about 80 knots and momentary gusts of 120 knots at its peak intensity. The cyclone caused destructive to very destructive storm to hurricane force winds over Fiji's Northern and Central Divisions, and damaging gale force winds over Tonga and Tuvalu. Damage in Fiji was extensive and severe due to high winds, heavy seas and torrential rainfall that lead to the worst ever flooding in the northern town of Labasa. 14 lives were lost with at least 3 persons still missing.

TC Ami maximum flood levels are shown in comparison to those of other severe floods of recent decades. In 5 of the 8 rivers, Ami produced the largest floods on record. At the other 3 stations, the magnitude of Ami's deluge was surpassed only by other cyclone-generated flood events.

Fiji and Rotuma

In Fiji, damage was extensive and severe especially to roads, infrastructure, buildings, houses crops and vegetation over Macuata, Cakaudrove and Lau provinces in the Northern and

Eastern Dvisions. To date, the confirmed total number of fatalities is 1 with 3 people still missing. Communication to and within the two divisions was severed for several days after the passage of Ami. Severe flooding in Labasa from its river took a heavy toll on the Township's resident and cause serious health and environmental risks. Water supply in Northern Division was severely disrupted, leaving residents without clean drinking water for several days and forcing Government to cart fresh water from mainland Viti Levu to the affected areas. Torrential rain also caused landslides. High waves and heavy surge generated by Ami caused coastal and inland inundation in many areas along its path, some quite severe. The extent of damage requiring immediate Government attention has been valued at F$60 million; however the socio-economic loss is likely to exceed $F100 million."

[16] The Appellant did not lead any evidence and consequently the success or otherwise of the Respondent's action depended on whether it had established on a balance of probabilities as to whether the damage to its stock and equipment was caused due to "storm and/or tempest" by water or rain entering the building through openings in the walls or roof made by such "storm and/or tempest". (vide: the Amended Statement of Defence in paragraphs 10 and 11 at pages 35 to 38 of the RHC).

Findings of the High Court

[17] The High Court arrived at the following findings viz:

(a) That, the exclusion in both policies qualified the rights of parties by subjecting them to specified procedures.

(b) That, a consideration of the wording in the two policies clearly manifested that the purpose of the limitation provisions was to exclude liability on the extended perils and therefore the onus lay with the insured to prove that the damage was a result of the extended peril and thereafter the insurer had to prove the exclusions. In other words the Respondent as Plaintiff had the initial burden to prove that the damage was caused by 'a cyclone' and the Appellant was obliged to prove that the damage was caused by 'flood' in declining the claim. (see: at page 11 of the RHC).

[18] In so far as those findings are concerned I have no hesitation in saying that the learned High Court Judge addressed her mind correctly on the law relating to the burden of proof.

[19] Next, embarking on an extensive consideration of the case law that was presented to her by both parties; deriving assistance from dictionary meanings and applying the principles and notions contained therein in the light of the evidence, particularly the documentary evidence, the learned Judge concluded that 'the sole cause of the floods on 14th January, was Cyclone Ami'. (at page 16 of the RHC), having earlier observed that 'even the proximity cause in this case is in favour of the plaintiff' (page 17 of the RHC) which drove her to the conclusion that 'the flood water' that damaged the plaintiff's property was either the sole or a dominant consequence of 'the cyclone' (paragraph [14] of the learned Judge's findings at page 17 of the RHC).

[20] Having arrived at the aforesaid findings, the learned High Court Judge then proceeded to examine the terms of the exclusion clauses contained in the two policies addressing in particular to the submissions made in the written submissions of the defendant (appellant) in paragraph 8.2 thereof."

[21] The defendant had argued:

> *"8.2 In relation to Special Conditions clause 1(b)(i), the policy excludes water or rain damage. The exception to this clause is if water or rain were to enter the building through openings in walls or roofs made by the storm/cyclone. The evidence before the court from Mr. Singh establishes this was not the case. The evidence does however shows that water entered into the building from under doors i.e. existing openings. This is also an agreed fact. The Plaintiff did not lead any evidence to suggest that flood waters entered from openings made by the cyclone."*

[22] In her interpretation of the said terms of the exclusion clauses contained in the two policies, in the background of the evidence which had been led before her, the learned Judge made the following observations viz:

> *"[47] The plaintiff was not cross-examined to establish his understanding of the special condition. Nor had the defendant adduced any evidence to establish it. PW1 Charan Jeath Singh confirmed that the roof of the building was intact after the cyclone although several other buildings and trees in Labasa were destroyed. The disruption caused by cyclone can vary. Some buildings would survive unharmed whilst others could sustain damage.*
>
> *[48] My understanding of the defendant's argument is that the exclusion in the special condition 1(b)(i) is only non-conditional if the storm water 'entered through the roof or opening of the walls'. Accordingly the insurer becomes liable only if the cyclone destroys the roofs and walls, allowing the water to enter the building. The defendant seems to foster an argument that if the rain water has seeped through the floor or any other way other than through the roof or the walls the claim is excluded.*
>
> *[49] Admittedly, the plaintiff's business was on the ground floor and it was the ground floor that was insured under the policy as an extended cover after receiving additional premium. Hence, the defendant knew at the time of extending the policy that that the insured property did not have a roof thereby the condition could not have applied to the plaintiff's business. It is a natural consequence that floodwater rises from the ground level upwards and not vice versa. If the insured property were on the upper floor then interpretation of the conditions would have been different. Then it would have been a natural consequence for the roof to have blown off and the walls destroyed due to the strong winds created by the cyclone. However, I am unable to give the same construction to a premises situated on the ground floor."* (vide: page 18 of the RHC).

[23] Having made the said observations on the factual matrix, as it were, the learned Judge resorted to the "contra preferentum rule of construction" on the legal matrix impacting

thereon, adverting to as the learned Judge did on judicial precedents, as revealed at paragraph [51] of her judgment.

[24] Consequently, the learned Judge held that "on the application of 'the contra preferentum' rule that the special condition 1(b)(i) in Policy 'X' as well as the exclusion clause in 'Policy Y' should be construed in favour of 'the defendant' (corrected to read as 'the plaintiff' later by her Order dated 29 March 2012. (vide: page 20 of the RHC). She held so on the basis that Clause 1(b)(i) is ambiguous and therefore she was unable to give a proper construction to the clause. (vide: paragraph [50] of the learned Judge's judgment).

The ultimate determination by the High Court on the evidence in the light of the law

[25] That ultimate determination is contained in the conclusion the learned judge arrived at when she held that:

> *"... ... the sole and the proximate cause of the damage, to the property in issue was (the) 'Tropical Cyclone Ami'."*
> (vide: page 19 of the RHC).

Consideration of the merits of the Appeal

[26] I have earlier recounted the evidence and shall proceed to examine how the learned High Court Judge considered the same in the light of the written submissions filed on behalf of both parties, the authorities referred to, the oral submissions and the relevant clauses in the two policies in question.

[27] The learned Judge also held that there is no ambiguity relating to the exclusion clause in policy 'Y' which drove her to hold that the said policy 'Y' should also be held in favour of 'the plaintiff' (as stood corrected in her order dated 29th March, 2012). (vide: page 20 of the RHC)

Are there misdirections and/or errors in the Judgment of the High Court?

[28] I shall begin with the learned Judge's interpretation in regard to Policy 'Y'.

Policy 'Y' – Extension Clause

[29] That clause extended the earlier covers with the endorsement "fire and other listed perils including cyclone and excluding flood."

[30] There is certainly no ambiguity in those terms. The cover applies to "a Cyclone" but expressly excludes 'flood'. Consequently, I cannot quite comprehend what the learned Judge meant when she held that, there is no ambiguity in the said clause and that also should be construed in favour of the plaintiff.

The learned Judge's findings and conclusions on the interpretation of the relevant policy clauses in the light of the evidence

[31] The relevant policy clauses covered

(a) water damage (due to burst pipes).

(b) loss or damage caused by water or rain entering the building through openings in the walls or roof(s) made by storm and/or tempest.

(c) cyclone.

[32] Other than the aforesaid categories the policy expressly excluded

(a) loss or damage caused by water or rain.

(b) loss or damage due to flood.

[33] There is absolutely no evidence of the loss and damage caused to the Respondent's stock and equipment was in consequence of water damage (due to burst pipes) or loss

or damage caused by water or rain entering the building through opening in the walls or roof(s). The very evidence of Charan Jeath Singh suggests quite the contrary. He said "tropical cyclone known as Ami – brought a lot of rain ... it was heavy rain ... (which as a result of water coming into Labasa Town lot of my goods were damaged. (page 1 – Supplementary RHC).

[34] Even if the witness's portion that the water level in the river rose considerably due to excess rain by "the cyclone" and that the water entered the building from under the doors (or existing openings), as Mr. Narayan demonstrated there is no evidence to suggest that flood waters entered from openings made by the cyclone.

[35] I have earlier recounted the evidence of the other two witnesses and the report produced through the hydrologist, Hemant Kumar Charan. (supra, paragraphs [12] to [16]).

[36] At the most what that evidence shows is that the flood was cyclone generated.

What then was the Immediate Cause of the loss or damage in question?

[37] "Causation" as Lord Wright said "... 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 p.706.

Is there a distinction between "immediate cause" and "proximate cause"

[38] "Proximate cause is based on convenience, public policy, a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a given point. It is practical politics, a question of expediency. There are no fixed rules to govern our judgment. There is the truth, little to guide us other than our common sense." (see: Winfield on

Torts at p.83 note 20, quoting Andrews, J. (dissenting) in **Palsgraf -v- Long Island Railroad** (1928) 248 N.Y. 339.

[39] I do not hesitate in saying that there is no distinction for all practical purposes between "immediate cause" and "proximate cause."

[40] On an analysis of the evidence what was the immediate or proximate cause that resulted in loss and damage to the plaintiff's stock and equipment?

[41] By common sense standards was it 'the cyclone' or 'the flood'?

[42] How would the man in the street view it?

[43] How did Charan Jeath Singh, the Managing Director of the Respondent himself understand it when he repeatedly referred to Labasa being a flood prone area and the type of flooding he saw during 'Cyclone Ami'?

[44] It is also in evidence that, the Labasa River had broken its bank and flooded the town.

[45] I agree with Mr. Narayan's submissions that, there was no damage from the actual cyclone – the cycle of wind did not blow away the windows and the actual damage was caused by the water. The cyclone did bring more water but the effective or the proximate cause was the flood.

[46] I also agree with Mr. Narayan's submissions that, **Caine -v- Lumley General Insurance Limited** [2008] 15 ANZ Insurance Cases, 61 - 756 and **Harper & Anor.**

v. Zurich Australian Insurance Ltd. & Ors [1987] 4 ANZ Insurance Cases 60 – 779 compare with the instant case.

[47] For the aforesaid reasons I hold that the proximate cause of the loss and damage to the Respondent's stock and equipment was 'the flood' and not 'the cyclone'.

[48] I also hold that, the observations made by the learned judge which I have recounted at paragraph [22] of this Judgment do not lead to the conclusion she arrived at.

[49] Accordingly I hold that, the learned Judge misdirected herself on the facts and on the law relating to "proxima causa".

[50] As Macgillivary and Parkington states thus:

> *"It is a fundamental rule of insurance law that the insurer is only liable for losses proximately caused by the peril covered by the policy."*

(8th edition, pages 1562, Chapter 22) cited with approval by the Court of Appeal of Sri Lanka in **Insurance Corporation of Sri Lanka –v- Seneviratne** [2002] 1 Sri LR 396 at p.40.

Conclusion

[51] In as much as I have held that the learned High Court Judge has misdirected herself on the evidence (facts) and the law relating to "proxima causa", the need to consider the applicability of the "contra preferentum" rule does not arise.

[52] I sympathise with the fate that befell the Respondent's property. I set aside judgment of the High Court and allow the appeal.

[53] Before concluding I would like to thank both Mr. Narayan and Mr. Nagin who appeared for the Appellant and Respondent respectively for their assistance to Court by way of their written as well as oral submissions and the authorities cited.

Orders

1. *The judgment of the High Court dated 23rd March, 2012 (later corrected to 29th March, 2012) is set aside and the appeal is allowed.*

2. *In all the circumstances of the case I make no award for costs.*

Hon. Justice W. Calanchini
PRESIDENT COURT OF APPEAL

Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL