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

CIVIL APPEAL NO. ABU 0010 OF 2019
[High Court Civil Action HBC No. 0043 of 2015]

BETWEEN: **KALABO INVESTMENTS LIMITED**

Appellant

AND: **THE NEW INDIA ASSURANCE COMPANY LIMITED**

Respondent

Coram: **Basnayake, JA**
Almeida Guneratne, JA
Jameel, JA

Counsel: **Mr. B.C. Patel for the Appellant**
Mr. R.R. Gordon for the Respondent

Date of Hearing: **17th September 2019**

Date of Judgment: **4th October 2019**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusion of Jameel, JA.

Almeida Guneratne, JA

[2] I agree with the judgment, the conclusion, the reasons given therefore, and the orders made by Justice Jameel.

Jameel, JA

Introduction

[3] This is an appeal from an Interlocutory Order dated 8 August 2018, of the High Court, whereby the learned Judge ordered the Appellant to provide the Respondent specified documents of the '*other named insureds'*, within 14 days of the judgment, in terms of the Respondent's Summons for Specific Discovery.

[4] The essence of the matters for determination by this court includes whether the learned Judge's Interlocutory Order ordering the Appellant to supply to the Respondent the documents set out in the said Order, correctly reflect the provisions of Orders 1, 2, and 24 of the High Court Rules 1988, as amended ("**RHC**"), whether such an Order could have been made based on the pleadings before court, and whether the expunging of the affidavit of one Peter Faire was in accordance with Order 41 of the High Court Rules 1988, as amended. The Appellant seeks to set aside the impugned Order, and allow the trial in the court below to continue on the pleadings already filed, and also seeks costs of this appeal as well as in respect of the proceedings of defending the Respondent's summons for discovery, in the court below.

The Pleadings

The Amended Statement of Claim

[5] By Amended Statement of Claim dated 12 June 2015, the Appellant pleaded (vide paragraph 5) that " *Kalabo Investments Limited trading as Shop N Save was the Insured* "under a Material Damage and Business Interruption Policy; on 10 June 2014 its Tavua shop was destroyed or damaged by a fire thus interrupting its business and thereby causing loss and damage. On 10 May 2015 it lodged with the Respondent's Loss Adjuster a claim under the said Policy for a sum of $1,034,804.45 for Business Interruption, covering the period 10 June 2014 to 1 October 2014, including claim preparation costs; and although the Respondent admitted liability under the Policy it had made no progress payment under the Policy.

[6] The Appellant pleaded that it had also submitted a claim for $ 1,488,349.14 under the Material Damage Policy, and sought judgment in a sum of $1,488,349.14 under the Material Damage

policy, and a sum of $ 1,034,804.45 for the period covering 11 June 2014 to 1 October 2014 under the Business Interruption Policy. Both claims were prepared by the Appellant's Accountants PwC and had been refused by the Respondent. The Appellant thus claimed the said sums and consequential damages for breach of the insurance contract, and 10% interest under the Insurance Law Reform Act 1996, and indemnity costs, in judgment.

The Statement of Defence

[7] In paragraph 3 of its Statement of Defence dated 17 August 2015, the Respondent admitted paragraph 5 of the Amended Statement of Claim that Kalabo Investments was the Insured, set out how it had assessed the loss and damages, and said that it had paid the Appellant a sum of $1,361,483.75, as admitted.

Minutes of the Pre -Trial Conference

[8] At the Pre-trial Conference (RHC 75-50) the agreed facts and agreed issues were recorded. Reproduced below are the Agreed Facts.

A. <u>AGREED FACTS</u>

1. *The Plaintiff is, and was at all material times, a duly incorporated company having its registered office at 411 Fletcher Road, Nabua, Suva carrying on business in Suva and elsewhere in Fiji under the name and style of Shop N Save Supermarket."*

2. *The Defendant is, and was all material times, a foreign company duly incorporated under the laws of India and having its principal place of business in Fiji at Suva carrying on business in Fiji as insurance underwriter.*

3. *At all material times the Plaintiff operated, and still operates supermarket business in Tavua town.*

4. *By a material damage and business interruption policy of insurance number 1124/10057167/003/01 ("the policy") the Defendant agreed to insure and indemnify the Plaintiff for the period 22 April 2014 to 22 April 2015 against the risks and for the amounts mentioned in the policy including against loss and damage by fire to the Plaintiff's business and stock and contents in the Tavua Shop.*

5. The Policy provided, inter alia:

a. <u>Insured:</u>
Kalabo Investments Limited trading as "Shop N Save Supermarket" etc.

b. <u>Business:</u>
All business of whatsoever kind conducted by the Insured but not limited to wholesalers, retailers, shopkeepers, supermarket operators etc.

c. <u>Perils Insured:</u>
All risks of physical loss or damage – unintended and unforeseen by the insured – not otherwise excluded by the policy.

d. <u>Insured Premises:</u>
Included Plaintiff's premises at Main Road, Tavua Town.

e. <u>Indemnity</u>
If any physical loss or damage – untended and unforeseen by the insured – happens to any insured Property during the period of insurance, the Company will indemnify the insured for that loss or damage.

f. <u>Material Damage cover for Tavua shop:</u>

Stock:	*$1, 000, 000*
Contents	*$750, 000*
Demolition cost	*$100, 000*
Claim preparation cost	*$200, 000*

g. <u>Business Interruption Cover</u>
$16, 250, 000 each and every loss

h. <u>Progress Claim Payments</u>
Where loss or damage has given rise to a valid claim on this Policy, the Company will make progress claim payments on production of acceptable evidence of insured loss. If the aggregate of progress payments exceeds the total amount of loss as finally adjusted, the insured will immediately refund the difference to the Company.

i. <u>Claim Preparation cost:</u>
This Policy extends to cover the reasonable cost of fees incurred by or on behalf of the insured of assessing or preparing any claim made under the policy.

6. *On 10 June 2014, whilst the policy was current, the Plaintiff's stock and contents in the Tavua Shop were destroyed or damaged by fire and consequently the Plaintiff's business was interrupted.*

7. *The Defendant was duly advised of the loss and material damage claim was lodged in terms of the policy ("the material damage claim") on 1 August 2014 as follows:*

i. Stock	-	*$1, 097, 702.61*
ii. Contents	-	*415, 487.30*
iii. Debris Removal	-	*41, 400.00*
iv. MD Claim Preparation cost	–	*12093.40*
	-	*$1, 566, 683.31*
Less 5% excess		*78, 334.17*
		$1, 488, 349.14

8. *The Defendant has since paid $1, 361,483.75 of the material damage claim to the Plaintiff pursuant to summary judgment obtained on 27 July 2015. The Defendant has also paid $129, 561. 75 as interest on $1, 361, 483.75 for the period 1 September 2014 to 20 August 2015 leaving a balance of $1, 563.45.*

The Terms of Adjournment (RHC 93-94)

[9] Trial commenced, but was adjourned and the following Terms of Adjournment dated 11 August 2017 were recorded:

1. *The parties agree to adjourn this part heard matter to attempt agreement on the quantum of B1 claim and on the balance MD claim, interest and costs.*

2. *To assist the parties to achieve agreement on the quantum of B1 claim:*

    a. *The Plaintiff will provide to the Defendant within a reasonable time supporting documents for its B1 claim and other documents or information requested by MDD's letter dated 30 July 2015 so far as is now reasonably possible to comply. The Defendant can use information held in respected of 2013 fire provided they give copy of what is used to Plaintiff.*

    b. *The Defendant will consider the documents provided in 2(a) and within a reasonable time from their receipt may seek such further documents or information as may be reasonably required to determine the quantum.*

c. The Plaintiff will respond within a reasonable time to the further request made by the Defendant under 2(b).

3. *On receipt of the documents referred to in 2 (a), the Defendant will, acting reasonably, consider making progress payment. If there is an overpayment due to any progress payment the Plaintiff will promptly refund the difference and pay interest on the over payment amount 7 days after the date over payment is determined.*

4 *The Plaintiff's and the Defendant's loss prepare/loss adjuster will, acting reasonably, liaise with each other and in good faith endeavor to reach agreement on quantum of B1 claim.*

5. *If either party is unreasonable in their request of documents or information or is unreasonably dragging out the matter, either party will be at liberty to apply to the Court for further directions on any matters of impasse.*

6. *The Defendant will not raise or rely on any of the documents annexed to the Affidavit of Avinesh Rai sworn on 2 August 2017 in this proceeding except MDD's letter of 30 July 2015 and except for raising and relying on the documents annexed to the said Affidavit of Avinesh Rai for the issue of interest on the B1 and MD claims.*

7. *The question of commencement date of interest on the B1 and MD claims will be decided by the Court in terms of s.34 of the Insurance Law Reform Act.*

8. *If the B1 claim or the MD claim is not settled by the parties by 30 November 2017 these claims will be assessed by the Court and the pending action will continue. In that event subject to (6) above and except for MDD's letter of 30 July 2015 and except for raising and relying on the documents annexed to the said Affidavit of Avinesh Rai for the issue of interest on the B1 and MD claims the parties will be at liberty to make or seek further discovery for the purpose of the hearing.*

9. *Liberty is reserved to either party to apply generally.*

10. *Costs of the action is reserved for agreement or determination by the Court.*

Events following the Terms of Adjournment

[10] After the terms were filed, between the period 23 August 2017 and 1 December 2017, correspondence was exchanged between David Maritz the Respondent's Loss Adjuster (of MDD, Forensic Accountants, located in New Zealand, (RHC 96, 99, 102), and Peter Faire the Appellant's Loss Adjuster, in order to exchange information and finalize the matter in accordance with the Terms of Adjournment.

The application for discovery

[11] Subsequently, by Summons dated 31 January 2018, the Respondent made an application under Order 24 r. 7.11(2) and 12 of the High Court Rules 1988, as amended for specific discovery of documents, supported by the affidavit of Avinesh Rai dated 30 January 2018, (RHC 85). In objection to the affidavit of Avinesh Rai the Appellant filed the affidavit of Peter Faire dated 20 April 2018 (RHC 104). Mr. Patel learned Counsel for the Appellant submitted to this court that the Appellant was lured into the false hope that the matter would be resolved, and that is why the Appellant agreed to the Terms of Adjournment.

[12] When the application for discovery was heard, the learned Judge upheld the Respondent's objection that Peter Faire's affidavit was not accompanied by the necessary authorization of the Appellant, and he expunged the said affidavit.

[13] Reproduced before are extracts from Avinesh Rai's affidavit dated 30 January 2018 (RHC 85 to 89 at 86 and 87), relevant to the discussion below:

> *"(6) I am informed by the Defendant's solicitors that during the negotiations of/for the TOA it was made clear to the Defendant's solicitors that Peter Faire would not be the one providing the details required by the Defendant to assess the claim of the Plaintiff.*
>
> *(7) I am informed by the Defendant's solicitors that the Defendant's Loss Preparer adjuster David Maritz advised the Defendant's solicitors that he informed Peter Faire that if that was the case the Defendant's expectation was that both Savings and the application of Average should be properly considered in any claim submission and that it would be counter -productive if these aspects continued to be ignored as they were in the PwC submissions.*

(8) I am informed by the Defendant's solicitors that the Defendant's loss preparer/adjuster David Maritz advised the Defendant's solicitors that Peter Faire agreed with/to this.

(9) The Defendant therefore had a legitimate expectation that it would receive a more realistic claim submission, which would then be easier and quicker to respond to.

(12) I am informed by the Defendant's solicitors that the Defendant's loss preparer/adjuster David Maritz informed them that he had reviewed this new claim and supporting information provided but was unable to provide a final measurement of the claim as he still required further information."(Emphasis added).

[14] The tenor of the affidavit of Avinesh Rai is one of surprise and ignorance; that the Respondent was unaware of, or not sufficiently acquainted with the said Peter Faire, despite the series of correspondence referred to above that passed between the two Loss Adjusters. This assumes significance later, in the light of the application made by the Respondent to have Peter Faire's affidavit expunged.

Judgment of the High Court

[15] In view of the contents of the impugned Ruling of the learned Judge, it is appropriate to reproduce it, instead of summarizing it. The order made was as follows; (RHC 145 -154 at 153 and 154): -

*"1. **THAT** the Plaintiff shall within 14 days provide to the Defendant's solicitors certified true copies of the audited accounts, including the detailed profit and loss statements and detailed balance sheets for the years and/or financial periods and/or financial years and/or accounting years 2013, 2014, 2015 and 2016 of R Prasad Limited, Ratsun Hotels Trading as Quest Hotels and/ or ANZ Banking Corporation and or any subsidiary company of R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation where more than half the normal value of whose equity share capital is owned by R Prasad Limited, Kalabo Investments Limited trading as Shop "N" Save Supermarket, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation either directly or through other subsidiaries and any entity over which R Prasad Limited, Kalabo Investments Limited trading as Shop "N" Save Supermarket, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation exercise management control;*

2. *The Plaintiff to pay summarily assessed the costs of $2, 000.00 to the Defendant within 21 days."* (Emphasis added).

The Grounds of appeal (RHC 2)

[16] The grounds of appeal pleaded are reproduced below. (RHC 1-5):-

1. *That the learned judge had no jurisdiction to make the Order requiring the Plaintiff within 14 days to provide to the Defendant's solicitors certified true copies of audited accounts of R Prasad Limited, Ratsun Hotels Limited, ANZ Banking Group Ltd and of the stated subsidiaries for the years 2013, 2014, 2015 and 2016 as per prayer no. 1 of the Defendant's Summons. None of the Orders 1, 2 or 24 of the High Court Rules 1988 relied upon by the Defendant permit the Court to make such an Order. The relevant Rules are Order 24 Rules 7 & 9 and these Rules do not give the Court jurisdiction to make the Orders it did.*

2. *That the learned judge did not consider the Appellant's written submissions filed on 20 June 2018 and 13 July 2018 and thereby erred in law and in fact. By not considering those submissions, the learned judge failed to appreciate that:*

   (a) *The insurance policy was a composite policy and not a joint policy. As such it had combined in one insurance a number of persons having different interests in the subject matter of the insurance.*

   (b) *The claim was by one insured only, namely, the Plaintiff, Kalabo Investments Limited for the loss to its Tavua supermarket.*

   (c) *None of the other named insureds operated supermarket business and their different interests insured under the composite policy were not relevant to the determination of the Plaintiff's claim to warrant disclosure of their financial information.*

   (d) *Relevance had to be determined by the pleadings and "average" was not pleaded.*

   (e) *Average had to be pleaded by virtue of s.27 of the Insurance Law Reform Act 1996 and Order 18 rule 7(1) (c) of the High Court Rules.*

   (f) *An order for specific discovery could not be made against the Plaintiff to provide audited accounts of ANZ Banking Group Ltd who was an insured by virtue of its interest as mortgagee and was not a party to the proceedings. There was also no evidence that the Plaintiff had in its possession such accounts of the bank. In fact, there is no entity in Fiji known as ANZ Banking Corporation.*

(g) An Order for specific discovery could not be made against the Plaintiff to provide the audited accounts of unnamed subsidiaries of each of the named insureds under a composite policy as they were not relevant to the Plaintiffs claim and there was no evidence that the Plaintiff had in its possession or control such accounts of any subsidiaries.

(h) An Order for specific discovery could not be made against the Plaintiff to provide the audited accounts R Prasad Limited and Ratsuns Hotels Limited when the Defendant had failed to show by evidence that these companies accounts were in fact audited for the relevant years or that there were in existence audited accounts for the relevant years in the possessions or control of the Plaintiff.

(i) The Plaintiff had provided all the information requested by the Defendant's loss adjuster MDD which was relevant to the Tavua Shop.

3. *The learned judge failed to consider MDD's letter dated 1 December 2017 which clearly stated that all the information requested by them to adjust the Plaintiff's claim had been received with the exception of details of the 2013-fire claim and details of PwC and Peter Faire's fees.*

4. *The learned judge failed to consider paragraph 1 of the Terms of Adjournment which indicated that the Plaintiff did not have the details of the 2013 fire claim and the Defendant was authorized to use the information held by it of such claim provided they give copy of what is used to the Plaintiff.*

5. *The learned judge failed to appreciate that the details of PwC and Peter Faire's fees were provided to the Defendant's solicitors on 9 July 2018.*

6. *The learned judge was wrong to expunge the Affidavit of Peter Faire on the grounds that he had not annexed a written authority of the Plaintiff to swear his affidavit. Mr. Faire was not an officer or employee of the Plaintiff but was its expert witness and as such no written authority was required by law. The law is correctly stated by Master U.L. Mohammed Azhar in* ***Pillay v Barton Ltd*** *[2018] FJHC 599.*

7. *The Order to provide audited accounts of unnamed subsidiaries is vague, uncertain and unenforceable.*

Discussion of the grounds of appeal

[17] Grounds 1, 2, 3, 4, 5 and 7 challenge the order of the learned judge allowing the application for discovery of the documents specified in paragraph 1 of the Order, on the basis that the court had no jurisdiction to make the impugned Order, because the Respondent failed to establish that the application fulfilled the criteria contained in Order 24 of the High Court Rules 1988, as amended. Ground 6 challenges the expunging of the affidavit of Peter Faire.

[18] It is convenient to first consider grounds 1,2,3,4,5 and 7 as these are matters on which the learned Judge ought to have been satisfied, before he exercised his discretion under Order 24 of the High Court Rules, 1988.

Grounds 1, 2, 3, 4, 5 and 7: lack of jurisdiction, relevance to matter in question, the substance of the Insurance policy, the identity of "the Insured", nature of the Policy

Substance and contents of the Insurance Policy

[19] The learned Judge appears to have assumed that the Policy is a joint one, and thus made the impugned Ruling. It therefore becomes necessary to examine some of the contents of the Policy, significant portions of which were admitted by the parties in the Minutes of the Pre-Trial Conference.

[20] The Policy states that;

> "*In consideration of the Insured having paid or promised to pay the required premium, the Company agrees to indemnify the insured as set out in the sections of this Policy.*
>
> "*Each Section of the Policy is to be interpreted as if issued as a separate policy, and unless the context requires otherwise, the word 'Policy' is to be interpreted accordingly.*

[21] The Appellant carries on a supermarket business. Listed in the Schedule to the Policy, are 28 locations of such business outlets. Item 24 is described as "*New Tavua Shop, Main Street, Tavua.*

[22] Section 1 of the policy covers 'Material Damage'. It states;

> *"If any physical loss or damage – unintended and unforeseen by the insured- happens to any Insured property during the Period of Insurance, the Company will indemnify the Insured for that loss or damage."*

[23] Although several parties are included under the definition of '*Insured',* the property insured is only the property specified in the Schedule to section 1of the Policy. It is titled "*Schedule of Locations/Sums Insured- Section -1*" Indeed, this was admitted both in the Statement of Defence and in the Pre-Trial Conference Minutes.

[24] In regard to Business Interruption, the Policy states as follows:

> "*THE INDEMNITY*
>
> *If, during the Period of Insurance;*
> *Any* ***property*** *or part* ***used o****r to be used by or for the Insured* ***at the Premises*** *for the* ***purposes of the Business is Damaged; and***
> *the Business carried on by the Insured at the Premises is consequently interrupted or interfered with;*
> *the Company will pay to the Insured the amount of loss resulting from the interruption or interference as provided in this Policy for each item of Insured Interest.*
> *The Company will not be liable under this Policy unless the Property is Insured Property and its insurers have accepted a valid claim for the Damage…"*
>
> *"Damage "means such loss or damage as would be covered under Section 1 of this Policy on property at the Premises. Damage also includes explosion damage to any Pressure Vessel whether insured or not. 'Damaged' has a corresponding meaning.*
> *'Insured Property' means property insured under Section 1 of this Policy and includes property insured under any equivalent stand -alone Material Damage Policy.* (Emphasis added).

Business Interruption.

[25] Section 2 of the Policy covers Business Interruption, and only business that is interrupted as a result of damage caused to the property or part of the property that is used for the Insured, at the Premises is covered in the Policy.

[26] Although the definition of '*The Premises'* on page 2 of the policy is described as *'All premises owned or occupied by the Insured and all other places where the insured has property used or to be used for the purposes of the Business anywhere in Fiji",* it cannot be concluded that this overrides the words used in the Schedule to Section 1, (page 6 of the Policy), which covers only the properties listed in Schedule 1.

[27] In any event, the Policy must be read as a whole and construed in a manner which is consistent with, and not repugnant to the purpose of the insurance contract. It must also not be alienated from well-known commercial practices of the insurance business. Finally, the construction must achieve not only a fair result, but a sensible one, taking into account not only the words used, whilst being mindful that the words used in Standard Form contracts, do not always and necessarily determine the real intentions, rights and obligations of the parties.

[28] Therefore, even if it were to be contended that the words used to describe '*The Premises'* covers a wide range of apparently unknown locations *anywhere in Fiji",* in my view, that contention would be negated by the inclusion of specific locations of the Premises set out in the Schedule to Section 1. Thus, in my judgement, what is contemplated by the Policy is interruption of the business by damage caused to the business carried on by the Insured whose interests are identifiable and linked to the premises covered by the Policy, which is only the Appellant.

[29] Further, it would also be unreasonable to assume that all the parties whose names are included in the Policy under the description of '*Insured'* had an insurable interest in the business carried on at the Insured Premises. This would not only be unwarranted, but would also be a denial of ordinary business practice. Put differently, could any one of the following parties whose names are described as '*The Insured'* have lodged a claim in respect of the fire that occurred at the Tavua Supermarket? I think not. Thus, for the Respondent to now claim that the audited accounts, of all the Insureds named, are necessary in order to determine the Appellant's claim under the Business Interruption Policy is without factual and legal basis.

Relevance to the matter in question; lack of jurisdiction

[30] Relevance to a matter in issue is necessarily linked to the pleadings. What is not pleaded cannot ordinarily be presumed to be related to the matter in issue, because it is assumed that only matters in dispute are contained in pleadings, and that relevant matters would not have been excluded from the pleadings. Thus, unless a matter was put in issue in the pleadings, or later admitted, it cannot subsequently be regarded as a matter in issue. If the Respondent had, in its Statement of Defence put in issue, the matter of applicability of Average to the claim of the Appellant, the Appellant could have countered it in reply. However, because the Respondent did not plead Average nor was it recorded in the Pre-Trial Conference Minutes, in my view there is no legal basis on which the Respondent's application for discovery could have been allowed and I will in due course, deal with the reasons for that finding.

[31] In this regard, the submissions of the Respondent's both in the court below and in this court are as follows; that it sought discovery of the documents to determine whether, and to what extend an Average clause *may b*e applicable in this case, it will '*also assist the Defendant in working out whether co-insurance (average clause) is applicable and if applicable, to what exte*nt', because the Respondent has a right to itself assess whether it is applicable and if so, to what extent. The Respondent submits further that if the Appellant disputes the applicability of Average then the Court could make a determination later.

[32] The Respondent in its written submissions relies on the following extract of the judgement in **<u>Mulley v Manifold</u>** (1959) 103 CLR 341, where the High Court of Australia said:

> *"I now turn to the pleadings to determine what are the matters at issue between the parties, because discovery is a procedure directed towards obtaining a proper examination and determination of these issues—not towards assisting a party upon a fishing expedition. Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to a train of enquiry which would, either advance a party's own case or damage that of his adversary."*

[33] However, my reading of the judgment in **<u>Mulley v Manifold</u>** (supra) reveals that the court also said the following:

"8. The affidavit filed here, however, affords no substantial assistance upon what is the only important question, i.e., whether certain documents, of which some do exist and some may or may not exist, do, or if they were to exist, would, relate to any matter in question in the actions. This is clearly something that <u>must be determined from the pleadings, not from an argumentative affidavit</u>" (Emphasis added)

[34] Accordingly, I am unable to accept the submissions of the Respondent, not only because the procedure relating to the discovery of documents cannot be used as a means of filling in gaps in pleadings and delaying court proceedings, but also because as in this case, the conditions precedent to an Order under Rule 24 of the High Court Rules 1988, as amended, were not established before the court. The impugned order could therefore not have been made.

[35] In support of the Appellant's argument that issues and relevancy are defined by the pleadings it relied *inter alia* on the judgment in **<u>Harrods Limited v Times Newspaper Limited and others</u>** [2006] EWCA 294 at [12] in which Lord Chadwick said:

> *In my view the judge was plainly correct to approach the application for further disclosure on the basis that it was essential, first, to identify the factual issues that would arise for decision at the trial. Disclosure must be limited to documents relevant to those issues. And, in seeking to identify the factual issues which would arise for decision at the trial, the judge was plainly correct to analyse the pleadings. The purpose of the pleadings is to identify those factual issues which are in dispute and in relation to which evidence can properly be adduced. It is necessary, therefore, to have in mind the issues as they emerge from the pleadings and are relevant in the present context."*

[36] In my view, before the summons for discovery could have been issued and inquired into, the person whose affidavit was filed in support of the application was required to state that he believed that the party from whom discovery is sought either has, or has at some time had, in his possession, custody or power, the document sought to be discovered or produced, and also that the document "*relates to one or more of the matters in question*". The documents sought in the Summons for Discovery by the Respondent, were described in the following words:

1. *"...certified true copies of the audited accounts, including the detailed profit and loss statements and detailed balance sheets for the years and/or financial periods and/or financial years and/or accounting years 2013, 2014, 2015 and 2016 of R Prasad Limited, Ratsun Hotels trading as*

> *Quest Hotels and/or ANZ Banking Corporation and/or* ***any subsidiary company of*** *R Prasad Limited, Kalabo Investments Limited trading as Shop "N" Save Supermarket, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation where more than half the normal value of whose equity share capital is owned by R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation either directly or through other subsidiaries and any entity over which R Prasad Limited, Kalabo Investments Limited trading AS Shop 'N' Save Supermarket, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation exercises management control.*

Nature and Substance of the Policy-Composite or Joint? Possession, custody and power of the documents ordered

[37] In paragraph [19] of the Ruling, the learned High Court Judge held that the word '*insured*' has been given a wide meaning. The learned Judge goes on to say:

> *"It includes whole of the business the plaintiff carries on in Fiji. It is clear by the term' and any entity over which an insured exercises management control"*

[38] The learned Judge's conclusion that the Policy was a joint policy, was based on the inclusion of several parties under the definition of the word '*insured*". The Policy defined "The *Insured*" in the following words:

> *"R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save S Supermarket, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation and any subsidiary company more than half the nominal value of whose equity share capital is owned by the named insured either directly or through other subsidiaries* <u>*and any entity over which an insured exercises management control."*</u> (Emphasis added).

[39] In determining who the "insured" covered under a Policy is, the following passage from **MacGillivray on Insurance Law**, (Fourteenth ed. Sweet & Maxwell 2018, paragraph1- 202) is a useful pronouncement. He said:

> *It has become commonplace for reasons of commercial convenience to insure the interests of a number of insured persons under one policy of insurance, either because it concerns property in which they are all interested, as in* <u>***General Accident Fire & Life Assurance Corp Ltd v Midland Bank***</u>

> ***Ltd***.*[1940]2 K.B.388,and State of the* ***Netherlands v Younell*** *[1997] 2 Lloyd's Rep.440, or because they are all companies within one corporate group which can obtain insurance more effectively through a single policy than by individual negotiation of separate policies, as in* ***New Hampshire Insurance v Mirror Group Newspapers*** *[1997]L.R.L.R. 24. The fact that a number of insureds are insured by one policy does not by itself make the policy a joint insurance. There cannot be a joint insurance unless the interests of the several persons who are interested in the subject matter are joint interests so that they are exposed to the same risks and will suffer a loss by the occurrence of an insured peril. So if two persons are joint owners of property, an insurance to indemnify both against damage to it will afford an indemnity against their common loss which they will both necessarily have suffered.* ***General Accident Fire & Life Assurance Corp Ltd v Midland Bank Ltd***.*"*

[40] **MacGillivray** *(supra)* also says at paragraph 1-203-;

> *Where the interests of different persons in the same insured subject matter are diverse interests, a policy expressed to insure all interested persons must be construed as a composite policy which is intended to insure each co-insured separately in respect of his own interest… It is usual to describe co-insureds in a composite policy as being insured for their respective rights and interests".*

[41] The Appellant relies on **New Hampshire Insurance Company v. MGN Limited** [1996] EWHC 398 (Comm), a case in which the court had to consider who "*the insured*" was, in an insurance contract. Staughton L.L. said:

> "*At this point we feel that one should sit back and examine what we mean by "the insured" in an insurance contract. The expression in our view covers two aspects of the person described. First, he is the person with whom the insurer contracts, the party who is bound as such. Secondly he is the person who is interested in the property or other event covered by the insurance and whose loss is to be made good if it occurs."*

[42] The submission of the Appellant is that the policy in this case was a composite policy; but for convenience, the different interests of a number of persons who may have some connection with the subject-matter may be dealt with in one policy. However, those different interests are not relevant to the determination of the Appellant's claim for its Tavua Shop to warrant an order of specific discovery of documents belonging to the other named insureds.

[43] In support of its submission that the Policy is a composite one, the Appellant relied on the following extract from **Lisa Murphy & Ors v Caithin Murphy (a child) and Nicola Holland** [2003] EWCA Civ 1862 Lord Justice Thomas said at [15]:

> "*It is not uncommon in the insurance market for insurers to use policy forms that are not specifically tailored to individual circumstance; they use the nearest standard form available and adapt it. A common example is a composite policy; in such a policy two or three persons are named as assured even though the interests being protected under the policy are different. In such a case, the policy will not be a joint policy, but a composite policy where the separate interests of each are protected in the same policy. In property insurance, for example, it is not uncommon for two persons to be named as the insured in respect of property when their interests are different. A good example of such a policy was a fire policy considered by this Court in **General Accident Fire and Life Assurance Corporation –v- Midland Bank** [1940] 2 KB 388; there were three insured named in the policy – a company occupying the insured premises, the freeholders of the premises and the bank who had a floating charge over the property of the occupiers. A question arose as to the nature of their interests. Sir Wilfred Greene M. R. put the issue very clearly:*
>
> > *"That there can be a joint insurance by persons having a joint interest is, of course, manifest. If A and B are joint owners of property – and I use that phrase in the strict sense – an undertaking to indemnity them jointly is a true contract of indemnity in respect of a joint loss which they have jointly suffered. Again, there can be no objection to combing in one insurance a number of persons having different interests in the subject-matter of the insurance, but I find myself unable to see how an insurance of that character can be called a joint insurance. In such a case the interest of each of the insured is different. The amount of his loss, if the subject-matter of the insurance is destroyed or damaged, depends on the nature of his interest, and the covenant of indemnity which the policy gives must, in such a case, necessarily operate as a covenant to indemnity in respect of each individual different loss which the various persons named may suffer. In such a case there is no joint element at all.*
> >
> > *[Where] [t]here is no joint risk; there is no joint interest; the measure of loss suffered by those two parties will be different, calling for a different measure of indemnity, and, accordingly, it seems to me that there is no joint element about the thing at all.*
> >
> > *Such a policy, in my judgment, may be more accurately described as a composite policy, because it comprises, for reasons of obvious convenience, in one piece of paper the interests of a number of persons*

> *whose connection with the subject-matter of the insurance makes it natural and reasonable that the whole matter should be dealt with in one policy."*

[44] To further its argument, the Appellant relies on the following passage in **Colinvaux's Law of Insurance,** (8th ed. 2006) (London, Sweet & Maxwell) at para. 14-03 which states:

> ***"Forms of co-insurance***
>
> *Joint and composite policies – Where two or more persons are insured under a single policy, it is important to determine whether the policy is joint or composite, in that the former is regarded as a single contract whereas the latter is a bundle of contracts. (The distinction is based on the nature of the interests of the assureds. If the assured share a common interest in the insured subject matter e.g. where they are joint owners of property or partners, the policy is joint. By contrast, if the parties have different interests, as in the case of a landlord and tenant or a mortgagor and mortgagee, the policy is composite."*

[45] The Appellant thus submits that because the interests of R.Prasad Limited, Ratsun Hotels Ltd and ANZ Bank are different from the Appellant's interests under the policy, no Order for specific discovery could have been made against these companies and the bank, merely because they are named as insureds in a composite policy.

[46] On the material before the court, in my judgment the policy is a composite policy, and the Appellant's claim was only in respect of one of the properties in which the Appellant's business was being carried out. The other insureds were not engaged in the supermarket business, and claim of the Appellant under the policy is to be assessed and determined on this basis. Thus the relevancy test was not met, nor did the Respondent establish that the documents sought were in the possession of the Appellant.

The applicability of section 27 of the Insurance Law Reform Act, 1996

[47] The Respondent's refusal to pay on the claim until the Appellant submitted to it, the documents it subsequently sought through discovery, was based on "Average". But as I have said earlier, the failure to plead this, precludes discovery of documents at the stage it sought

the order, the Respondent having failed to comply with section 27 of the Insurance Law Reform Act 1996.

[48] Statutory remedies for the insurer are provided for in sections 20 to 27 of the Act. The contract of insurance must therefore be read in context and subject to the provisions of section 27.

[49] Learned Counsel for the Respondent submitted that the "*broker would have discussed the proposed placing slip with the Appellant before submitting it to the Respondent",* however, no such presumptions can now be made, when it is founded on a question of fact, which was not pleaded.

[50] The Respondent submitted further that the Policy was drafted by the agent of the Appellant, and therefore the *contra proferetum* rule applies. Again, this was not a matter pleaded and cannot be entertained on the pleadings already filed.

[51] In paragraph [12] of the judgment, the learned Judge states that the application for discovery was made under Order 24 r.7, 11(2) and Order 12. However, in paragraph [12] of the judgment the learned Judge has considered the provisions of Order 24, r. 11(2) and Order 24 r.12. Order 24 r. 7 provides as follows;

> *7.-(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.*

[52] According to r.7 what is envisaged is for the court to order a party to "*make an affidavit",* which must state a fact, that is whether any such document is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.

[53] Order 24 r.7 (3) provides as follows:

> (3*) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.*

[54] The affidavit of Avinesh Rai which was filed in support of the application for discovery did not meet the criteria set out in Order 24 r.7 (3) because it did not contain an averment that complies with the requirements in r.7(3); it did not state that according to his belief or the grounds of his belief that the Appellant had in its possession, custody or power the documents sought to be discovered, namely the "*audited accounts of the other named insureds",* nor did they said affidavit specify or indicate how the said documents were relevant to the matter in issue. In any event, under Order 24r.7 (1) read with and (3) only requires an affidavit to be filed, not for documents to be produced.

[55] The other provision considered by the learned judge was Order 24 r. 11(2). Although the learned Judge referred to Order 24 r.11 (2), it is not relevant. However, the learned Judge considered Order 24 r. 12, which provides that:

> *12. At any stage of the proceedings in any cause or matter the Court may, <u>subject to rule 13(1),</u> order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit.* (Emphasis added).

[56] What is important to note is that r.12 provides for the court to order a party to produce any document to court, and it is for the court to deal with it as it thinks fit.

[57] However, Order 24 r. 12 is subject to r. 13, and this requires the court to form an opinion that the order of production is necessary for the purpose of either disposing fairly of the matter, or for saving costs.

[58] The Appellant submits, and as is clear from the letter dated 13 November 2015 (399 of the RHC) which was sent to the Appellant by the Respondent's Loss Adjuster, the Respondent did not apply Average to the Material Damage claim, and therefore it cannot be said to apply to the Business Interruption claim. In my judgement this submission is correct.

[59] Before I make my order on these grounds of appeal, I must say this. I observe that in paragraphs [20], [25], and [29] of the Interlocutory Order dated 27 February 2017, the learned High Court Judge appears to impliedly refer to only the Plaintiff as the insured. I am prepare to assume that when the learned Judge made the final order he had, by a genuine oversight used the words of the Respondent in the summons to discovery. However, this does not entitle me to ignore the impugned order, because non-compliance with the order has serious consequences for the Appellant.

[60] In my judgment, Order 24 r.12 only empowers the court to order any person to produce the documents to court, and not to order it to be served on a party. I do not see either a factual or legal basis for the court to have used the contents of the affidavit of Avinesh Rai to make the impugned order that it did, as it did not meet the criteria required by Order 24 r 7, or even r.13(1). For the reasons I have set out above, I find that the learned Judge could not have made the impugned order for discovery purely on the basis that the other parties were included in the description of the Insured, without first being satisfied that there was a legal basis on which he could conclude that all properties belonging to all those parties, are covered by the Policy. Therefore, I allow grounds 1, 2, 3, 5 and 7.

-Ground 4: *Failure to correctly construe the Terms of Adjournment*

[61] The learned Judge's reasons for ordering the Appellant to produce the documents appears to be on the basis that the Appellant failed to fulfil its obligations under the Terms of Adjournment. In making the impugned Order, at paragraph [17] of the judgment the learned judge states *"The Plaintiff does not deny possession of the documents the defendant seeks discovery of*".

[62] In fact the Respondent failed to show that the Appellant trading as Shop 'N Save, *R.Prasad Limited, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation and/or any*

subsidiary company of R Prasad Limited, Kalabo Investments Limited trading as Shop "N" Save Supermarket, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Group Ltd. exercised management control", and therefore had the audited accounts of these parties. The court simply assumed a fact. In the affidavit filed by the Appellant's Company Secretary Ashnita Deo, dated 16 August 2018 (RHC 158), she states specifically that the Appellant does not have audited accounts of the parties set out therein. (Emphasis added).

[63] The Respondent's Loss Adjuster's letter dated 12 September 2017 [RHC 96] for the first time raised the question of co-insurance and requested documents of "*other named insureds*". This was not agreed or within the Terms of Adjournment, nor did it arise out of the Loss Adjuster's letter dated 30 July 2015. The Loss Adjuster's letter dated 30 July 2015 cannot be taken out of context, but must be considered in the context of the claim for the Tavua shop premises. It did not refer to the other named insureds. Therefore, it was incorrect to have concluded that the Appellant had resiled from the agreement contained in the Terms of Adjournment. In any event, failure to comply with the Terms of Adjournment cannot be the basis of making an order under Order 24 of the High Court Rules 1988, in the absence of the applicant having satisfied the tests of custody, possession and relevance to determine the matters in question in the proceedings.

[64] As I have already found, the pleadings proceeded on the basis that the only insured was the Appellant. Therefore, the order could not have covered unnamed subsidiaries of the "other named insureds", is vague and outside the scope of Order 24 of the High Court Rules. The documents envisaged by the Terms of Adjournment are different from the documents sought in the application for discovery. Ground 6 of the appeal is therefore allowed.

Ground 6: Expunging of Peter Faire's affidavit- a curable irregularity or fatal defect?

[65] The Appellant submits that the expunging of the affidavit of Peter Faire (RHC 104), was an error of law because Peter Faire was not an employee of the Appellant, but had been engaged as an expert, and was its claim preparer, and therefore no written authority was needed in terms of the High Court Rules. In this context, it is not insignificant that in paragraph 6 of the affidavit of Avinesh Rai dated 30 January 2018, it is clear that it was the avowed and long-

standing intention of the Respondent to exclude the involvement of Peter Faire in the preparation of the Appellant's claim. It is also not insignificant that the Respondent had previously objected and refused to process the Appellant's claim prepared by PwC, too.

[66] Order 41r.9 (2) which had been relied upon by the Respondent to have Peter Faire's affidavit rejected, provides as follows:

> "*Every affidavit must be indorsed with a notice showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be used or filed without the leave of court"*

[67] Order 41 r. (1) 4 provides as follows:

> (4*) Every affidavit must be expressed in the first person and, unless the Court otherwise directs, must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact.*
>
> *In the case of a deponent who is giving evidence in a professional, business or other occupational capacity* ***t****he affidavit may, instead of stating the deponent's place of residence, state the address at which he works, the position he holds and the name of his firm or employer, if any.* (Emphasis added).

[68] The requirement in Order 41 r.9 (2) is to be read in the context of its purpose. In this case, Peter Faire was not employed by the Appellant, in the sense of being a regular pay-roll employee. He was an independent contractor engaged by the Appellant for his professional expertise. He had been engaged by the Appellant, as an expert and Peter Faire says as much in paragraph 17 of his affidavit,

[69] Order 41 r. (1) 4 requires a person who files an affidavit on behalf of his employer to state so because of the legal relationship of principal and agent, and the consequences that flow from that. That rule does not apply to a person who is not employed by the party on whose behalf he deposes the affidavit.

[70] The purpose of the other requirement of Order 41 r. 9(2); which requires the indorsement to show on whose behalf it is filed and the dates of the swearing and filing is to identify the party to whom the affidavit relates, meaning the Plaintiff or Defendant and to provide information in respect of compliance with the respective time lines set out in law, or by order of court, as the case may be.

[71] It is significant that the rule does not provide for an automatic rejection of the affidavit. The rule specifically includes the discretion of the court to consider whether to permit the affidavit to be '*filed or used'*. Thus, if the absence of indorsement is noticed by the Registrar at the time of filing, there is nothing to preclude him from seeking the leave of the Judge to permit filing despite the absence of the indorsement. In the alternative, the party on whose behalf it is filed may seek the indulgence of court to permit the affidavit to be used. It would then become incumbent on the court to determine on a consideration of all the circumstances, whether to permit filing, or if filed, whether to permit it to be used.

[72] However, in seeking to enforce compliance with rules of procedure, it is necessary to bear in mind the purpose of the rule. Rule r. 9 of Order 24, is unlike r.6 which deals with the contents of the affidavit, or rule 4 which deals with defective affidavits. Those rules are in respect of the substantive contents itself. However, r.9 is only is in respect of a matter extraneous to the contents of the affidavit, and therefore striking out the affidavit is not only not provided for, but is on the contrary, left to the discretion of court to make a determination as to whether to allow the affidavit to be filed or used, as the case may be.

[73] Affidavit evidence is an alternative to oral evidence, and is required to be expressed in the first person, to ensure direct evidence, identification and capacity, and due authorization to depose to the contents of the affidavit.

[74] However, notwithstanding due authorization having been duly indorsed, an affidavit can nevertheless be struck out if it is scandalous, irrelevant or otherwise oppressive. This is because what is important is the contents of the affidavit and how that evidence impacts on the matters in dispute that require determination.

[75] In my view, a person who deposes to an affidavit in the capacity of professional expertise, would, in terms of Order 24 r.1 (4) only need to state that he has been engaged in his professional capacity;

> "*he may, instead of stating the deponent's place of residence, state the address at which he works, the position he holds and the name of his firm or employer, if any.*"

[76] In this case, this requirement has been fulfilled as reflected in paragraph 16 of Peter Faire's affidavit in which he states that he *prepared a claim* on behalf of the Appellant. The preparation of the claim was done in his professional capacity, he was not setting out the position of the Appellant, as an employee of the Appellant would have had to do. Instead, what Peter Faire did is that he applied his professional and expert knowledge to the information (reflecting the details of damage) submitted by the Appellant, and thereupon prepared a claim in terms of the Policy. Thus, although Peter Faire was retained and engaged by the Appellant, his professional ethics would preclude him from compromising his professional duties in the process of using his professional expertise and rendering a professional opinion. Although for the purposes of the court proceedings Peter Faire would be described as a witness 'on behalf of the Appellant', he, unlike a paid employee, is not bound by the position of the Appellant as he is an 'independent' witness who expresses a professional opinion, and not a 'position'. Therefore, such an independent expert does not, and in point of fact cannot, be 'authorized' by the person who retained him to set out matters in the affidavit. The contents of the affidavit will in respect of such a witness, contain his professional opinion. I therefore I am of the view that the Respondent's objection was without basis.

[77] Further, Order 41 r. (10) (1) provides as follows:

> *10.-(1) Subject to paragraph (2) an original affidavit maybe used in proceedings notwithstanding that it has not been filed in accordance with rule 9.*
>
> *(2) An original affidavit may not be used in any proceedings unless it has previously been stamped with the stamp duty.*

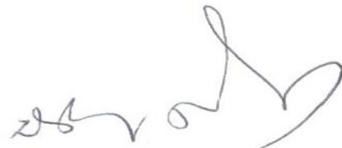
[78] In my judgment therefore, despite the objection taken by the Respondent to the affidavit of Peter Faire, it was open to the learned Judge to have exercised his discretion and given reasons

for refusal to allow it to be used. This is however not what happened, and that was the error of law.

[79] On a consideration of the rules 1, 9, 10 of Order 41, in my judgment, the learned Judge ought not to have expunged the affidavit of Peter Faire, on the grounds on which he did. The order expunging the said affidavit is set aside and the affidavit of Peter Faire is restored and is to be regarded as part and parcel of the proceedings in the trial. Ground 6 is therefore allowed.

Orders of the Court:

1. *The Appeal is allowed.*
2. *The Interlocutory Order of the High Court dated 8 August 2018, in respect of the Respondent's Summons for Discovery, is set aside.*
3. *The High Court is directed to continue the partly-heard Trial, on the existing pleadings.*
4. *The order expunging the affidavit of Peter Faire is set aside, and the affidavit is restored as part of the pleadings and proceedings.*
5. *The Respondent is ordered to pay to the Appellant a sum of $2500.00 as costs in the court below, and $ 5000.00 as costs of this appeal.*



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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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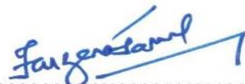
Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL



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Hon. Justice F. Jameel
JUSTICE OF APPEAL