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

Civil Appeal No. ABU 0013 of 2018
(High Court Civil Action No. HBC 327 of 2009)

BETWEEN	:	**ABBCO BUILDERS LIMITED**
		Appellant
AND	:	**NEW INDIA ASSURANCE COMPANY LIMITED**
		Respondent
Coram	:	**Lecamwasam JA** **Almeida Guneratne JA** **Jameel JA**
Counsel	:	**Mr. B. C. Patel for the Appellant** **Mr. F. Haniff for the Respondent**
Date of Hearing	:	**13 February 2020**
Date of Judgment	:	**28 February 2020**

JUDGMENT

Lecamwasam, JA

[1] I agree with the reasons and the conclusions reached by Jameel, JA.

Almeida Guneratne, JA

[2] I agree with the judgment of Her Ladyship, Justice Jameel, the reasons contained therein, the conclusions drawn and the orders proposed.

Jameel, JA

[3] This is an appeal from the judgment of the High Court dated 29 March 2016 by which the learned Judge held that the Respondent had wrongly repudiated the claim of the Appellant, and dismissed the Appellant's claim on the basis that it had failed to prove the quantum of damages claimed.

[4] At the hearing of this appeal Mr. Haniff, Learned Counsel for the Respondent upon being asked by court, conceded that the Respondent had not challenged the finding of the learned trial Judge that the Respondent was wrong in repudiating the claim of the Appellant under the flood exemption/exclusion clause. In view of this, the finding of liability for breach of contract remains undisturbed.

Summary of Factual Background

[5] In its Statement of Claim dated 1 October 2009, the Appellant pleaded that on 7 April 2007, Fineland Investments had contracted with the Appellant to construct a seven-storey building on property **(*"the project")*** owned by the former, located at the corner of Gladstone Road and Mitchell Street, Suva. The Appellant took out a Contactors All- Risks Policy ***("the Policy")*** from the Respondent dated 31 May 2008. The value of the coverage was $4,000,000.00 (Four Million). The validity period was 1 June 2008 to 1 June 2009. It covered all-risks, save and except those specifically excluded. Of those, the relevant exclusions were as follows:

> *"Perils: This insurance does not cover the risk of Flood /inundation and Burglary".*

[6] On 13 March 2009, due to a storm that occurred in Suva, the retaining wall that was built by the Appellant along the boundary of the project property collapsed. The Appellant notified the Respondent duly in terms of the conditions in the

Policy, and supplied full particulars to the Respondent's Loss Adjuster. In its claim, the Appellant also notified the Respondent of ANZ Bank's interest in respect of the facility it had received from the bank. By letter dated 7 July 2009, the Respondent repudiated the claim on the basis of the flood exclusion clause.

[7] The Appellant's first cause of action was for wrongful breach of the contract of insurance, notwithstanding the fact that the loss or damage had been caused by an insured peril.

[8] The Appellant's second cause of action was for breach of the statutory duty of good faith imposed under section 11 of the Insurance Law Reform Act 1996 (***"the Act"***). The Appellant pleaded that the Respondent had a duty to act honestly and in good faith in the process leading to its decision on the Appellant's claim; this required the Respondent to disclose the Loss Adjuster's Report, and to grant an opportunity to the Appellant to present its position, before it decided to reject the Appellant's claim.

[9] Accordingly, the Appellant claimed judgment in a sum of $128,635.00 VEP, (as the cost of repairing the retaining wall), damages for breach of statutory duty, interest on damages, or alternatively interest at 10% under the Insurance Law Reform Act 1996, and indemnity costs.

[10] In its Statement of Defence, the Respondent denied liability under the Policy, although it admitted that the Appellant had duly notified it in terms of the Policy.

Proceedings before the High Court

[11] At the Pre-Trial Conference it was agreed and recorded *inter alia* that the only relevant exclusion to the policy stated in the form of an endorsement, was the risk of flood/inundation and Burglary, and that Appellant had duly notified the

Respondent of the loss and damage, and had supplied full particulars to the Respondent's Loss Adjuster.

[12] The two issues raised and recorded in the court below, in respect of this question were as follows:

> *1. Is the Plaintiff's claim excluded by an exception stated in the policy?*
> *2. If not, what is the amount owing by the Defendant to the Plaintiff?*

[13] On behalf of the Appellant, Mr. Vijay Krishnan, the Project Engineer, Mr. Chandrika Prasad the Foreman of the building project, and Mr. Lehk Ram Narayan, the Managing Director of the Appellant Company testified.

[14] On behalf of the Respondent Mr. Bevin Seveiinsen, Project Manager of Engineered Building Systems Limited ***("EBS")*** testified. EBS was the sub-contractor of the Appellant for this project, and it was EBS that constructed, and rebuilt the subject wall after it was damaged.

[15] The Appellant contended that the wall had collapsed due to heavy rain, the Respondent contended it was due to flood. Both parties led in evidence weather reports for the relevant day. After evaluating the evidence, the learned Judge found that the collapse of the wall was due to accumulation of rain water in the trench between the road and the retaining wall, and that this did not come within the meaning of 'flood' as contained in the Policy. At the end of trial, the learned judge made the following orders:

> *(1) The defendant was wrong in repudiating the claim of the plaintiff on the ground that the damage was caused by flood.*
>
> *(2)The claim of the plaintiff for damages is dismissed since it has failed to prove the quantum of damages claimed.*

The grounds of appeal

[16] The grounds of appeal formulated by the Appellant are reproduced below:

> *1. Having held that the Respondent was liable under the policy of insurance the learned trial Judge had an obligation to assess the loss in accordance with the principle to do the best he could on the evidence before the court.*
>
> *2. The Learned Trial Judge erred in law and in fact in holding that the Appellant had failed to prove its loss or damages when there was uncontradicted evidence to prove, on the balance of probabilities, such as loss of damages.*
>
> *3. The Learned Trial Judge failed to consider the Appellant's claim for breach of S.11 of the insurance Law Reform Act 1996 and thereby erred in law and in fact.*
>
> *4. The learned Trial Judge erred in law and in fact in not awarding costs to the Appellant.*

Grounds one and two
Discussion of the evidence before the High Court

[17] A question that remains for determination is the basis for indemnification of the insured; namely, whether mere proof of the occurrence of the event is sufficient to trigger the obligation to indemnify, or whether the insured is obliged to go further and provide proof to the satisfaction of the insurer, of the expenditure actually incurred in respect of repair or restoration of the insured property. These matters will be dealt with in considering the grounds of appeal. The evidence of Mr. Vijay Krishnan and Mr. Chandrika Prasad establish the occurrence of the event, and the steps taken by the Appellant after the event. One matter of

significance is that the Respondent's Loss adjuster did a site inspection on 16 March 2009, that is almost immediately after the incident. There is no controversy flowing from their testimony, and it is unnecessary to examine it for the purpose of determining the matters under appeal. It is necessary only to discuss the evidence of Mr. Narayan, and Mr. Seveiinsen, to determine the grounds of appeal.

Mr. Narayan's evidence

[18] Mr. Narayan testified that the wall collapsed on 13 March 2009, at which time he was overseas. He spoke on the telephone soon thereafter to the Manager of the Nadi office of the Respondent (the relevant branch), and upon his return he called for quotations to effect the rebuilding of the wall. The Appellant submitted its claim dated 8 April 2009, to which it had annexed two quotations, as well as an itemized list of the work that was to be done by the Appellant (its own workers), and the estimated cost of that work. The two quotations were from EBS and Concrete Solutions (Fiji) Ltd.

[19] However, by letter dated on 7 July 2009, the Respondent repudiated the Appellant's claim, on the basis that its Loss Adjuster had concluded that "*the cause of the loss was due to a torrential downpour and the very heavy rain caused run off which in turn overflowed from gutters and drains as they were unable to cope with the volume of water. ...*", and that it therefore was excluded under the flood exclusion clause.

[20] Mr. Narayan testified that the damaged wall had been rebuilt, and some clearance of the debris was done by his own workers (which had been referred to in the original claim to the Respondent), the wall was rebuilt as per the quotations, and the Appellant had paid the parties. When asked in cross-examination as to the claim of $11,800.00 for removal of damaged panels from the site, clearing of debris, Mr. Narayan said that his workers did it with a crane from EBS (RHC 234), EBS charged about $180.00 for the use of the crane, but he had not brought

to court proof of payment to EBS for use of the crane. This work was necessary in order to clear the site and rebuild the damaged wall. In fact, under section 1 of the policy under the heading of Material Damage, it was specifically provided for. The Appellant was therefore within its contractual rights when it proceeded to clear the debris and rebuilt the wall, in order to proceed with the remaining construction.

[21] In respect of the quotation received form EBS for rebuilding the retaining wall that collapsed, Mr. Narayan testified that EBS charged that to the Appellant's account, EBS being the sub-contractor for the main project which the Appellant was engaged in. He explained that the Appellant paid EBS progressively. When asked whether he had documents in court to prove that the Appellant had paid $31,900.00 to EBS, which is the sum specified in its quotation dated 16 March 2009, Mr. Narayan said he did not have them to be produced in court. On being questioned as to whether he had paid VAT, he replied he had no proof of payment. This will be dealt with later in this judgment.

[22] When Mr. Narayan was cross-examined on the quotation of Concrete Solutions (Fiji) Ltd. which was for a sum of $39,095.00 (RHC 119), he testified that Concrete Solutions (Fiji) Ltd. came to the site and did the stitching and waterproofing, and that he paid them for it. Even at this point, there was no challenge to the figures in the quotations. Instead, cross- examination was confined to whether there was proof of payment for work done. There was no challenge to the testimony that both EBS and Concrete Solutions (Fiji) Ltd. who had supplied the quotations) had indeed completed the work required to rebuild the damaged wall.

Mr. Seveiiensen's evidence

[23] On behalf the Respondent, Mr. Seveiiensen, the Managing Director of EBS, which was the sub-contractor of the Appellant in respect of this project, testified. He said that EBS was sub-contracted to construct the pre-cast components of the

retaining wall, he went to the site on the day that the wall collapsed, the original wall had been built according to New Zealand standards, and he reported the incident to Vijay Krishnan, the Appellant's employee. As Managing Director of EBS, although he did not personally prepare the invoices, he was aware that EBS used to invoice the Appellant for work done by EBS for the Appellant. When asked in cross - examination about the quotations supplied to the Appellant for the rebuilding of the collapsed wall, he said that he recalled that they were *"generous"* costing. By *'generous'* he meant low, not high. When asked about how VAT is included, he said that when issuing an Invoice, it reflected cost plus VAT, and when issuing a quotation, it was the VEP, as that was the industry practice.

Substance and effect of the evidence before the High Court on the issue of damages

[24] It is relevant to note that the incident occurred in March 2009, the claim was made in April 2009, the wall was reconstructed shortly thereafter, the claim was repudiated in July 2009, and the trial took place several years later in 2016.

[25] As for the conduct between the parties, the evidence revealed that right from the beginning, the Respondent refused to entertain the Appellant's claim, refused its request to re-consider its decision to repudiate the claim, refused to disclose the Loss Adjuster's Report, and opted not to lead it in evidence. There was no discernible reason for the Respondent to not disclose it, nor use it to challenge the quotations submitted by the Appellant.

[26] One point of intense debate between the learned Counsel before this court was the line and effect of the cross-examination of Mr. Narayan in respect of the quotations he produced. On behalf of the Appellant, Learned Counsel submitted that the Respondent did not challenge the quotations produced by Mr. Narayan, on the basis that they were either excessive or incorrect in any other way.

[27] In this regard, learned Counsel for the Respondent however took the position that although he did not cross-examine Mr. Narayan on the contents of the quotations, because Mr. Narayan conceded that he did not have ready for production in court, the proof of payment to third parties for the work done to rebuild the wall, the learned judge did not "accept" the evidence of Mr. Narayan. However, that remained a matter of conclusion for the learned Judge at the end of the trial. It did not obviate the need for the Respondent to challenge the quotations when produced. In fact, in paragraph 10 of the Respondent's written submissions in this court, the Respondent states, "*the Judge did not accept the evidence of Mr. Narayan on the quantum".* Learned Counsel has drawn the attention of this court to paragraph [40] of the High Court judgment, which is reproduced below:

> *[40] It is correct to say that there is no absolute requirement in law that evidence of a witness should be corroborated by documentary evidence in every instance. It is a question of reliability and trustworthiness of the witness. In the instant case, at the trial the learned counsel for the defendant questioned the witness for the plaintiff as to whether he had any documentary proof of the expenses incurred but his answer was in the negative. The witness also stated in cross examination that he had no receipts to show that he paid the value added tax. As submitted by the learned counsel for the defendant the documentary proof of the payments made is necessary for the defendant's case for the reason that the work of the retaining wall in question had not been completed at the time it collapsed. The workers were in the process of stitching the precast panels. It is also pertinent to note that Mr. Narayan has failed to give a detail account of the expenses incurred by the plaintiff in his oral testimony. It is therefore, incorrect for the plaintiff to say that its witness's evidence on the question of quantum of damages went unchallenged and uncontradicted. I therefore, hold that the plaintiff has filed to prove the quantum of damages claimed and his claim for damages is liable to be dismissed*.

[28] On a consideration of the transcript of the proceedings, which I do not need to reproduce, and for reasons I will set out below, I have to agree with the Appellant's contention, that the contents of the quotations remained unchallenged. In my view, the failure to produce proof of expenses incurred to restore insured property, and failure to prove that the insured property was subject to damage and consequential loss, are two distinct matters.

[29] The Respondent's emphasis on the failure of the Appellant to produce proof of payment to the sub-contractor EBS (the Appellant's own sub-contractor for the project), and Concrete Solutions, in my view led to the failure to effectively challenge the contents of the quotations.

[30] With respect, I am unable to conclude that the cross-examination of Mr. Narayan demolished his testimony or the veracity of the contents or genuineness of the quotations. On the contrary, in my view of the evidence in cross-examination did not challenge the contents of the quotations, or their genuineness. The only concern seems to have been whether proof of payment was available for production in court. Failing to produce the receipts in court, does not by itself or by implication necessarily mean that the Appellant incurred no expenditure to rebuild the wall, nor does it tantamount to the quotations being false, so as to have enabled the court below to have concluded that the Appellant had failed to prove the quantum of the damage.

[31] In reality, it was not that the Appellant had failed to prove the quantum of the damage; it was just that the estimates costs of rebuilding when submitted to the Respondent was initially rejected on the wrong basis, and that resulted in the Respondent not considering the claim, leaving the Appellant with no choice but, to proceed to effect rebuild the insured property in the light of the repudiation of the claim. In that background it was untenable for the Respondent to later claim that the quantum of damages had not been proved.

[32] If the Respondent intended to establish that the quotations were nothing but meaningless pieces of paper in the absence of proof of payment of the sums contained therein, or any other sums, then Mr. Narayan ought to have been confronted with matters relating to the genuineness and contents, so that he would have had the opportunity to explain both, the quotations and his lack of receipts.

[33] There was nothing to have precluded the Respondent from taking steps to question the genuineness of the quotations.

[34] A well-known and relevant description of cross-examination which is worth recalling, is an extract from **Phipson on Evidence** (13th Ed., Para 33-68, cited in Cases and Materials on Evidence, Waight &Williams, 2nd ed., 1985). It is as follows:

> "*The object of cross-examination is two-fold to weaken, qualify or "destroy the case of the opponent; and to establish a party's own case by means of his opponent's witness. It is not confined to matters proved in chief; the slightest direct examination, even for formal proof, opens up the whole of the cross-examiner's case.....the witness may be asked not only as to facts in issue, or directly relevant thereto, but all questions which, though otherwise irrelevant, tend to impeach his credit..".*

[35] The rule of evidence in **Browne v Dunn** (1894) The Reports 67*, (* cited in Cases and Materials on Evidence, Waight &Williams, 2nd ed., 1985) has been followed and its essence is stated as follows by Wells J. in **Reid v Kerr** (1974) 9 S.A.S.R. 367 at 374-375 as follows:

> *"Speaking generally, it is essential to the fair conduct of a trial that a party should put to each of its opponent's witnesses in turn so much of his own case as concerns that particular witness... As a corollary to this, it must also be borne in mind that where it is intended to suggest that a witness is not speaking the truth on a particular matter, his attention should be drawn to what is going to be suggested about it, so he may have an opportunity of explanation."*

[36] If it was the Respondent's intention to take up the position that the quotations were unacceptable then that should have been put to Mr. Narayan so that he could have explained his failure to produce receipts for work done by third parties. In my view, it was not just Mr. Narayan's evidence, but the totality of the evidence of all the witnesses that ought to have been considered, and their probative value assessed fairly. This was not done, and that is what ought to have been done, once the learned judge found that the Appellant had breached the contract of insurance. Thus, the court was left with the quotations intact and uncontradicted. I say this because the initial evidential burden was no doubt on the Appellant and the Appellant had discharged that burden, in the circumstances of this case.

[37] I now turn to assess the value of the evidence of Mr. Seveiinsen, who was called to testify on behalf of the Respondent. In 2009, at the time of the incident, Mr. Seveiinsen had been the Managing Director of EBS, the sub-contractor of the Appellant. The Respondent considered him to be an independent witness. There was no suggestion made to him that the quotations EBS gave the Appellant for the purpose of lodging the claim in 2009 were unacceptable, or that the Appellant had not paid for the work done. In fact, Mr. Seveiinsen described the quotation as reasonable, and 'generous', he was aware of invoicing for work done (as opposed to quotations), and that EBS commenced constructing the replacement panel *"very, very soon after the event"* (RHC 260-262). Mr. Seveiinsen did not say that the Appellant had not paid EBS for work done. In the light of his unequivocal evidence on the supply of quotations and the subsequent rebuilding of the damaged wall, whether expenditure had in fact been incurred became a non-issue, and the failure to produce receipts, receded to the irrelevant background.

[38] Whilst it is true that proof of payment to a third party for the work done in connection with the damaged wall was not produced, nor was it explained, in the light of this evidence that was before the court, and the failure of the Respondent to demolish the credibility of Mr. Narayan's and Mr. Seveiinsen's testimony, the court ought to have taken cognizance of the fact that the damaged wall had to

have been rebuilt at some monetary cost and ought to have assessed damages on a realistic and objective basis.

(a) The nature of an insurance contract

[39] To answer grounds one to three of the grounds of appeal, requires a consideration of the nature of an insurance contract.

[40] In **Prudential Insurance Co. v IRC** [1904] 2 K.B. 658 at 664 (cited in MacGillavray on Insurance Law, Fourteenth Ed. 2018), Channell J defined a contract of insurance as follows:

> '*Whereby for some consideration, usually but not necessarily for periodical payments called premiums, you secure for yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event. A contract of insurance, then, must be a contract for the payment of a sum of money, or for some corresponding benefit such as the rebuilding of a house or the repairing of a ship, to become due on the happening of an event, which event must have some amount of uncertainty about it, and must be of a character more or less adverse to the interest of the person effecting the insurance"*

[41] An insurance contract is therefore different from other types of contracts because it seeks to distribute losses amongst various parties, and the amount of the premium is not equivalent to the value that the insurer must pay, should the covered peril occur. In other words, a contract of insurance is one in which the insured is entitled to be indemnified upon the occurrence of the insured peril. Unless the policy specifically requires and provides for specific documentation to accompany the claim, and in addition requires specific documentation to prove the cost of restoration of damaged insured property, it cannot be presumed that the burden lies on the insured to establish restoration costs, by only submitting

receipts of third parties, or that the insurer is freed of its liability under the contract of indemnity.

[42] Chitty on Specific Contracts (29th Ed.para.41074, p. 1209) states:

> "*A claim under a contract of insurance which is a contract of indemnity is a claim for unliquidated damages even, it seems, when the contract is a valued one.* ***Jabbour –v- Custodian of Israeli absente Property*** *[1954] 1W.L.R.139. The measure of damages in the case of valued contracts raises few difficulties. If there is a total loss the assured recovers the agreed value, and if there is a partial loss the assured recovers a proportion (the depreciation in the actual value) of the agreed value.* ***Elcock –v- Thomson*** *[1949] 2 K.B.755."*

[43] Whilst being mindful of the need to keep to a minimum, quoting passages from precedent, in view of the grounds of appeal, and the arguments raised by both parties, and the fact that both parties relied on the judgment of the Supreme Court in in **Lal v New India Assurance Company Ltd**. [2014] FJSC 3; CBV0003.2013 (26 March 2014), it is useful to quote the relevant passages that will feature in my discussion of the grounds of appeal:

In this case, the Supreme Court said:

> *"[16] Justice Pathik in* ***Sharda Nand –v- Dominion Insurance Ltd*** *[2000] FJHC 167; HBC 57, 1996 (30 June 2000) in a claim regarding a fire insurance policy cited the decision in Leppard – v- Excess Insurance Co. Ltd (1979) 2 All E.R. 668 where Megaw L.J. stated:*
>
> *"Ever since the decision of this Court in* ***CASTELLAIN -v- PRESTON*** *(1883) 11 QBD 380 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."*

[17] Justice Pathik then referred to the dictum of Brett L.J. in ***Castellain –v- Preston*** *which was:*

> *"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, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong." (Emphasis added).*

[18] Justice Pathik stated further that:

> *"The amount payable must be the amount of the plaintiff's loss. The amount of an insured's loss is*

> *not necessarily measured by reference to the cost of replacement or repair of the property destroyed or damaged and may be measured in other ways. "In the case of chattels, the measure may be the costs of the chattels destroyed, its market value, its value to the owner as part of a going concern, or the cost or repair of the damage ... [**Vintix Pty Ltd –v- Lumley General Insurance Ltd** (1992) 24 NSW LR 627 at 633, Giles J]".*

[44] It is necessary to be mindful that in **Lal v New India Assurance Company Ltd.** (*supra*), the High Court gave judgment in favour of the Petitioner and awarded General damages and Interest. However, what is pertinent for the determination of this appeal is the following finding by the Supreme Court:

> *[13] The present case which dealt with an insurance claim had to deal with the nature of damages that were sought by the Petitioner. In the proof of such damages matters relating to special damages, general damages and unliquidated damages have been discussed in the High Court and the Court of Appeal. The basis of a claim of insurance which is one of indemnity has not been considered in the context of an insurance claim in both Courts and as a result the loss claimed by the Petitioner was not considered in the manner that it should have been considered according to law relating to insurance."* (Emphasis added).

[45] Having said that, the Court held further that:

> *"[21] In a claim based on an insurance policy what is required to be considered is whether the claim made by the Insured comes within the terms of the policy, whether the conditions necessary to lodge a claim have been satisfied, whether the Insured is liable if the claim made by the Insurer is not met and if so to what extent is the insured liable for the loss incurred by the Insured. If it is concluded that the Insurer is liable and thereby has caused a breach of the contract, how should the Insured establish his claim regarding the loss he has suffered when claiming damages. In processing a claim under a policy it is usual for the Insurer to get a valuation done through their Loss Adjustors of the loss suffered by the Insured. So the basic questions that would arise in an action on a insurance policy would be whether the Insurer is liable regarding the claim and secondly to what quantum of damages is he liable*."(Emphasis added).

[46] In distinguishing an insurance contract from other types of contract, in **Fuji Finance Ltd. v Aetna Insurance Co. Ltd.** [1996] 4 All E.R. 608, where the full sum became payable after five years, the court said :

> *"One is in a different world from the world of insurance when the only contractual right is a right to have a claim fairly considered....when a person insures I think that he is contracting for the certainty of proper consideration being given to his claim...."*[Emphasis added].

[47] What is significant is that a claim under a contract of insurance, which is termed a 'policy'', is not made on the basis of an actionable wrong committed by the insurer, so as to require the claimant to establish the loss, in a way that is required in a regular claim for damages. Instead, a claim under an insurance policy is a claim or demand made in terms of an agreement of indemnity between the parties, in terms of which the insured is assured that should the covered peril occur, the insurer will make good the loss suffered. This is why at the time the contract is executed, there is an agreed value placed upon the insured property. And, this is also why, in the case of a claim that is being processed, the insured's Loss Adjuster would inspect the property to ascertain the extent and value of the loss, which ought to be within the range of the original value given, failing which, the claim could even be rejected for fraud or misrepresentation. While the claim is being processed, it is usual for it to be 'adjusted' on the recommendation of the insurer's Loss Adjuster. It is for this reason that a contract of insurance is required to be entered into on the basis of good faith, which element has now received statutory recognition in section 11 of the Insurance Law Reform Act, 1996. The obligations on the part of the insured includes *inter-alia* the submission of the claim in a timely manner; ensure truthfulness in the contents of the claim, and mitigation of the loss, if possible. This in turn, requires the insurer to consider the claim in good faith and not impose burdens on the insured that are unreasonable, incapable of being fulfilled, or have not been agreed upon, and to keep the insured aware of the reasons for rejection of the claim.

The Policy

[48] The preamble to the Policy in this case, states as follows:

> "*NOW THIS POLICY OF INSURANCE WITNESSETH that subject and in consideration of the insured having paid to the Company, the premium mentioned in the schedule and subject to the terms, exclusions, provisions and conditions contained herein or endorsed hereon the*

Company will indemnify the insured in the manner and to the extent hereinafter provided."

[49] Clause 5 provides inter alia as follows:

> *The relevant terms of the Policy were*:
> "*Section 1 – Material Damage:*
> *The Company hereby agrees with the insured (subject to the excursions and "conditions contained herein or endorsed hereon) that if, at any time during the period of insurance stated in the said Schedule, or during any further period of extension thereof the property (except packing materials of any kind) or any part thereof described in the said Schedule be lost, damaged or destroyed by any cause, other than those specifically excluded hereunder, in a manner necessitating replacement or repair the Company will pay or make good all such loss or damage up to an amount not exceeding in respect of each of the items specified in the Schedule the sum set opposite thereto and not exceeding in the whole the total sum insured hereby*. (Emphasis added).

[50] Accordingly, in my view, the occurrence of the insured peril, triggers the obligation to indemnify, in the absence of fraud or some other factor arising from the terms of the policy, entitling the insurer to repudiate the claim. This is particularly so in situations in which the insurer does not dispute the occurrence of the insured peril, and does not claim fraud, as was the case here.

[51] I was unable to find any evidence led by the Respondent to establish that the duty to indemnify becomes operative only upon restoration costs being established by documentation which is subject to its approval or satisfaction.

Duty to assess loss and damages on the evidence available

[52] The onus of establishing a cause of action giving rise to damages lies on the claimant. He must satisfy the court both as to the fact of damage and as to its quantum. In this case, there was no dispute that the damage occurred. The amount of the damage or the costs that would have been incurred in restoring the wall, is in this case, the estimates as set out in the quotations. The quotations obtained by

the Appellant in 2009, almost immediately after the damage, was the correct basis on which to proceed to quantify the damage, in the absence of them being challenged. That was indeed the estimated cost of repair and restoration. Thus in my view, the Appellant had provided sufficient evidence to establish loss despite the absence of the receipt of payments. Had the Respondent not repudiated the claim at the time it did, it would in all probability, have been considered by the Appellant's Loss Adjuster, who would then have adjusted the estimates if he thought it necessary.

[53] Having repudiated the claim in 2009, for the Respondent to demand that the Appellant produce, seven years later in 2016, receipts for payment to third parties in respect of expenses incurred in 2009, was unreasonable.

[54] If the Respondent's contention were to be upheld, it would result in an insurer being able to escape liability despite a finding by court later that the repudiation was bad in law. In other words, the Respondent will be able to gain a benefit, as a result of a breach of contract. Thus, an insurer repudiates a claim at its peril.

[55] In **Holtby v Brigham & Cowan Hull Ltd**. [2000]3 All E.R. 421, CA, (cited in McGregor on Damages, Seventeenth ed. 2003), a case of apportionment of liability amongst multiple employers and damages in tort, the court said:

> *"The question should be whether at the end of the day and on consideration of all the evidence, the claimant has proved that the defendants are responsible for the whole or a quantifiable part of his disability. The question of quantification may be difficult and the court only has to do the best it can by using its common sense… to achieve justice, not only to the claimant, but the defendant and among defendants*."

[56] The Appellants submission that the learned Judge failed to distinguish between proof of loss under an insurance policy, and proof of claim of pecuniary recompense for an actionable wrong, is correct. For this it relied on the dicta of the Supreme Court in **Lal v New India Assurance Co. Ltd**. (*supra*).

The Quotations and Correspondence

[57] To the claim, the Appellant had attached two quotations. One was from Concrete Solutions (Fiji) Limited dated 18 March 2009 (RHC119) which contained the cost and summary of works to be carried out. It also said:

> *"Please note that the site will need Excavator to remove rubble and backfills including corner in situ damaged wall and footings will need excavation".*

[58] The other quotation was from EBS dated 16 March 2009 (RHC 121) which had itemized what needed replacing, and was for a total of $31,900.00.It is to be noted that EBS was the sub-contractor of the Appellant in respect of this project.

[59] By letter dated 16 April 2009, that is shortly after the claim was submitted, McLarens Young International, the Loss Adjusters wrote to the Appellant as follows:

> *"We confirm we represent NIA Lautoka and refer to the Inspection undertaken on 16.03.09 by Peter Marks from this office.*
> *So as* (sic) *we may be in a position to quantify the loss, adjust the claim and report with a settlement recommendation could you make available to our office your detailed claim submission together with supporting documentation.*
> *Thank you for your assistance."*

[60] By letter dated 7 July 2009, (RHC123), the Respondent repudiated the Appellant's claim, and stated *inter alia* as follows:

> *"We refer to the claim lodged in connection with the damage to the retaining wall. We have received the assessor's report and it was found that the cause of the loss was due to a torrential downpour and the very heavy rain caused run off ...Since there is no coverage of flood /water damage perils available under the policy, we regret to inform you that the claim is not admissible. Therefore we would close the claim file as "No Claim'" which may please be noted."*

[61] By letter dated 13 July 2009, Mr. Narayan responded to the Respondent's letter intimating that he did not agree with the assessment, and would be pursuing the matter further.

[62] Subsequently, the Appellant had instructed Counsel to make representations to the Respondent on its behalf, and by letter dated 14 September 2009 (RHC 136), the Respondent was informed that the rejection of the claim would be challenged, and the Respondent was requested to reconsider the repudiation of the claim in order to avoid litigation. This letter also stated that the Respondent had provided no evidence to support its decision to reject the claim, that the insured is entitled to know the basis of the repudiation, and that such reports would be discoverable documents, should litigation commence. Therefore, the Appellant called upon the Respondent to state fully the reasons for the rejection of the claim and to release the assessor's reports and reports of the Meteorological Department that the Respondent was likely to use, in the event litigation commenced. However, the Loss Adjuster's report was not disclosed by the Respondent on the basis that it was a privileged document. It is also significant that the Loss Adjuster's Report

was not pleaded or put in evidence despite the Respondent stating that the repudiation was based on it.

[63] The learned Judge held that the Respondent (Defendant) was wrong in repudiating the claim. However, despite holding that the Respondent had acted in breach of the contract, the learned Judge refrained from assessing and awarding damages on the basis that the Appellant had *'failed to prove the quantum of damages claimed'*. Therefore, Issue number 2, raised in the court below.

[64] The learned Judge's reasons and conclusions in this regard are set out in paragraphs [35] to [39] of the judgment, and to enable me to deal fully with the grounds of appeal, they are reproduced below. The learned Judge said:

> *[35] It is the submission of learned counsel for the plaintiff that Mr. Narayan testified that he lodged with the Nadi Manager of the defendant company on 08th April 2009 and receipt of the claim has been acknowledged by the letter dated 07th July 2009 rejecting the claim and that with the claim the plaintiff enclosed two quotations from Concrete Solutions and Engineered Building Systems. The quotations alone do not establish the quantum of damages claimed by the plaintiff and mere acknowledgement of a claim does not mean that the defendant accepted the amount of the damage contained in it and on the other hand since the defendant repudiated the entire claim it would not have any reason to examine the amounts claimed by the plaintiff under each heading.*
> *[36] The learned counsel while admitting that the plaintiff did not produce any document to show that the amounts claimed had in fact been spent submitted that for*

the following reasons the defendant is deemed to have accepted the quantum of claim;

Paragraph 5(d) of the policy states:

In the event of any occurrence which might give rise to a claim under this Policy, the insured shall

(d) Furnish all such information and documentary evidence as the company may require.

(b) The defendant had three months between the lodgement of the claim on 08th April 2009 and the rejection on 07th July 2009 to require documentary proof of any item of the claim but it did not do so.

(c) The defendant had appointed Loss Adjuster, McLarens Young International, to act for them during this period and it was their job to verify the claim. They too did not raise a query on the claim lodged and must be presumed that their independent inquiries had confirmed the accuracy of the claim.

[37] None of the grounds set out above have the effect of discharging the plaintiff from its burden to prove the quantum of damages claimed. The requirement to furnish documentary evidence as required by clause 5(d) of the insurance policy does not necessarily mean that the insurer is liable to pay the amounts contained therein. This contention is supported, as conceded by the learned counsel, by the fact that the defendant had appointed a Loss Adjuster to estimate the actual loss. It is also important to note that since the entire claim of the plaintiff was repudiated the defendant had no reason to call for documentary proof of the claim.''

Duty to assess damages on the evidence available

[65] The Respondents relied on the dictum Lord Goddard in **Bonham Carter v Hyde Park Hotel Ltd.** (1948) 64 T.L. R. 177 in respect of the burden of a plaintiff to prove damages. In this case the plaintiff claimed damages from the proprietors of the Hyde Park Hotel for theft of her goods from her hotel room. While conceding the damages must be proved by the claimant, I do not, with respect, see the relevance of that case to a case of a contractual right flowing from a contact of indemnity.

[66] The totality and effect of the evidence of Mr. Narayan and Mr. Seveiinsen was that the wall collapsed, the debris was cleared by the Appellant's workers having used a crane hired from EBS, the Appellant called for quotations and received two quotations from two different organizations for the various matters associated with the reconstruction of the broken wall, the wall was rebuilt by EBS, and the Appellant paid EBS for it. It is in this background that this court must view the dismissal of the Appellant's claim for damages on the basis that it had failed to prove the quantum of loss and damages.

[67] Both parties relied on the judgment in **Punjas v New India Assurance Co. Ltd.** [2019] FJCA 250; ABU115.2017 (29 November 2019) in which the court upheld the principle that a challenge to a witness' credibility or a document must be done by way of cross-examination. In that case too, the insurer did not cross examine the insured's witness. In the opinion of the court in that case, this was because the insurer contended that the insured had no insurable interest. In this case too, the insurer took up the position that the claim was within the exclusion clauses, and repudiated the claim, but did not cross-examine the witness on the particular documents (the quotations), which it later contended to have no value.

[68] None of the questions or suggestions put to Mr. Narayan in cross-examination went to impeach his credibility. Indeed, if Mr Narayan's evidence was to be impeached or challenged, it would have been necessary to give him an opportunity to respond to it. Thus, apart from cross-examination in regard to failure to produce proof of payment to third parties for work carried out, there was no cross-examination in respect of the figures in the quotations or the genuineness of the quotations.

[69] If the learned Judge disbelieved Mr. Narayan, it could have been only in regard to whether or not work had been done to rebuild the damaged wall. In view of the evidence before the court, such a conclusion was impossible. There was nothing on the evidence that could have led the learned Judge to conclude that the quotations themselves were false or lacking in credibility. Therefore, to refrain from assessing damages on the basis that the quantum had not been proved, was not correct, and amounted to an error of law.

[70] Thus, the resultant position is that there was clear evidence before the court that the Appellant's insured property had been damaged, as a result it has suffered loss, it had to incur expenditure to restore the damage, and that it incurred expenditure to make good the damage suffered.

[71] In my view, an insurer who initially repudiates a claim which is later found to be a wrong repudiation, is precluded and estopped from later demanding proof of expenditure incurred to repair or restore the insured property. This would apply even more strongly in respect of an insurer who refuses to inform the insured of the reasons for the repudiation, and who also refuses to make known the contents of its own Loss Adjuster's Report. In view of the repudiation by the Respondent, it is estopped from requiring the Appellant to submit proof in 2016, seven years after the incident.

[72] Despite the learned judge's conclusion that there is no absolute requirement that the evidence of a witness should be corroborated by documentary evidence in every instance, in the absence of a specific finding that the learned Judge himself found the witness Mr. Narayan's testimony unworthy of credit, it would be unsafe and impermissible for this court to presume that he did so.

[73] Such being the case, I do not see a basis on which the learned judge could have concluded that there was no proof of loss or damage caused and restored.

[74] Further, I find that the conclusions reached by the learned judge in paragraph [40] of the judgement do not properly reflect the evidence that was before the court. The learned Judge found that the retaining wall had not been completed at the time it collapsed. Even if the retaining wall had not been completed at the time it collapsed, it was irrelevant in regard to whether the Appellant had receipts to prove it had paid for the reconstruction and from which the conclusion could have been drawn that there was sufficient proof that the Appellant had incurred expenditure, and that it was reasonable to assume that the expenditure had been incurred, that is, paid for. I must hold that it was the duty of the learned judge to assess damages on the evidence available. **Lal v New India Assurance Company Ltd** (*supra*), **Fai Insurance (Fiji) Ltd v Prasad's Nationwide Transport Express Courier Ltd** [2008] FJCA 101; ABU0090.2004S (16 April 2008).

[75] In this case, there was no unequivocal finding by the learned trial Judge that he disbelieved the contents of the quotations produced by Mr. Narayan were unacceptable. Indeed the learned Judge held that quotations alone was not proof of loss. It would also have be impossible for the learned Judge to have doubted the contents of the quotations, in view of the fact that they were the very same quotations that were submitted initially to the Respondent in 2009. For the findings of a trial Judge to be accorded the protection usually accorded to his

findings of fact, there ought to have been a finding of fact. In this case, there was no clear finding that the learned Judge disbelieved Mr. Narayan's evidence. Therefore this is not a case in which the Appellate court is setting aside a trial Judge's finding of fact. Rather, it is a case in which the learned trial Judge has not arrived at a specific conclusion in regard to a relevant fact, namely whether there was uncontradicted evidence available in respect of the claim. Thus, this court is not overturning a finding of fact.

[76] As to the damages to be awarded to the Appellant, on the basis of the conclusions I have reached, I consider it fair and proper to assess damages on the basis of the evidence available. The Appellant's claim in 2009 was for a sum of $128,635.00 VEP. The Loss Adjuster's letter dated 15 April 2009 (RHC 122) that when the claim was lodged, he would "*quantify the loss and adjust the claim*". This would mean that as is commonly the practice, the Loss Adjuster would not accept the total figures claimed by the insured, but would reduce it by some reasonable percentage making way for exaggerations or other factors. Keeping that in mind, this court considers it just to award damages in a sum of $109,340.00 as damages. Accordingly, I allow grounds 1 and 2 of the grounds of Appeal.

Ground three – breach of Section 11 of the Insurance Law Reform Act 1996

[77] In view of my observations and findings on grounds one and two, I do not consider it necessary to pronounce on the matters urged in ground three of the grounds of appeal.

Ground four – Failure to award Costs

[78] In view of the finding of the learned Judge that the Respondent was in breach of the insurance contract, in my view he ought to have awarded damages for loss suffered flowing from the breach of contract. Accordingly, I award a sum of

$2500.00 to be paid by the Respondent to the Appellant, as costs in the court below, and a sum of $ 5000.00 as costs in this court. For the reasons set out above, I allow ground four of the appeal.

The claim for Interest

[79] The Appellant has claimed interest on the judgment sum. This matter was addressed before this court by both learned Counsel as well as in their written submissions. The task of this court has been lightened by the fact that they have both agreed that it is simple interest and not compound interest that ought to apply. The principles in **Bankstown Football Club v CIC Insurance Ltd.** (1997) 187 CLR 384, were followed by this court in **Punjas** (*supra*), and this court sees no reason to deviate from that.

[80] Accordingly, learned Counsel for the Respondent has correctly conceded in his written submissions that if this court were to overturn the learned trial Judge's finding on quantum, then interest must accrue on the judgement sum from 7 July 2009 (the date on which the Respondent wrongly repudiated the Appellant's claim), to the date of payment. This court makes order that the Appellant is entitled to interest of 4% on the judgment sum of $109, 430.75 from 7 July 2009, until the date of payment in full.

The Appellant's Claim for VAT

[81] The Appellant claimed VAT of 9% on the indemnity sum receivable under the policy. This was on the basis that the Appellant has to pay VAT on any indemnity sum it receives under the policy.

[82] Section 3(8) of the VAT Decree 1991 imposes VAT "on a registered person who receives an amount by way of an indemnity payment relating to a loss incurred in respect of goods and services in the course or furtherance of making taxable supplies". This provision applies to the Appellant.

[83] The policy specifically provides for the Respondent to pay the VAT component of the claim, and this is found at the bottom left hand corner, just above the date of the policy, in the form of the words "VAT as applicable".

[84] The indemnification which is now paid to the Appellant in the form of damages will not be meaningful and effective if the Respondent does not pay the relevant VAT component on the sum indemnified. The VAT component will be the relevant percentage as set out in law, and in this case will be based on the judgment sum ordered by this court, that is $109,340.00. The payment of VAT by the Respondent will be reflected in its own VAT Returns to the Revenue. The Appellant correctly relied on the judgments in **Ghim Li Fashion (Fiji) Ltd v Commissioner of Inland Revenue (2008) FJSC 15; CBV 0008.2007S and Punja and Sons Ltd v New India Assurance Co Ltd [2019] FJCA 250;** ABU115.2017 (29 November 2019).

[85] The reference of the learned Judge to VAT in paragraph [40] of the Judgment was misconceived and arose from the questions raised in cross-examination of Mr. Narayan. For the purposes of clarity, I might add that the VAT component payable by the Appellant to the Revenue would be the VAT it charges to the persons to whom it makes supplies.

[86] The VAT paid by the Appellant to its sub-contractors would be reflected in its own VAT Return as Input Tax. The Appellant submits that it had not claimed this component of VAT. This is correct. What has been claimed by the Appellant and what it will be required to pay will be VAT on the sum received as

indemnification in the form of damages in this case. Accordingly, this court need not arrive at any finding on this matter except to make the order that I have now made.

The Orders of the Court are:

1. *The Appeal is partly allowed.*

2. *That part of the judgment of the High Court dated 29 March 2016, dismissing the Appellant's claim for damages is set aside, and a sum of $109,340.00 is awarded, as damages.*

3. *The Respondent is ordered to pay to the Appellant simple interest on the sum of $109,340.00 from 7th July 2009 to the date of payment in full.*

4. *The Respondent is ordered to pay to the Appellant VAT at the relevant rate, on the judgment sum of $109,340.00 within 28 days from the date of this judgment.*

5. *The Respondent is ordered to pay to the Appellant a sum of $2500.00 as costs in the court below, and a sum of $5000.00 as costs in this court, within 28 days from the date of this judgment.*

.....
Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

.....
Hon. Justice F. Jameel
JUSTICE OF APPEAL