IN THE HIGH COURT OF FIJI

IN LABASA

CIVIL JURISDICTION

CASE NUMBER:	**HBC 02 OF 2006**
BETWEEN:	**MOHAMMED ALAM**
	PLAINTIFF
AND:	**COLONIAL NATIONAL BANK**
	1ST DEFENDANT
AND:	**QUEENSLAND INSURANCE (FIJI) LIMITED**
	2ND DEFENDANT
AND:	**REGISTRAR OF TITLES**
	3RD DEFENDANT
AND:	**MOHAMMED SHAMEEM AIRUD KHAN**
	4TH DEFENDANT
Appearances:	*Mr. A. Sen for the Plaintiff.*
	Mr. C. B. Young and Mr. Sharma for the 1st Defendant.
	Mr. P. McDonnell for the 2nd Defendant.
	Mr. Mainavolau for the 3rd Defendant.
	4th Defendant in Person.
Date/Place of Judgment:	*Monday 02 June 2014 at Suva.*
Coram:	*The Hon. Madam Justice Anjala Wati.*

JUDGMENT

Catchwords:

Mortgaged property damaged by fire – Substantial debt and arrears on the mortgaged property when the property damaged – fire being one of the insured perils- bank as mortgagee settles the claim for an amount far less than the loss –mortgagor sues on grounds of bad faith by the bank and insurer – indemnity condition for contents- whether contents insured too- whether bank misrepresented that contents insured too – determining the parties to the contract of insurance –should compromise be subject to mortgagee's consent- material non-disclosure- principles of material non-disclosure- breaches of CCA and FTD raised- value of mortgagee sale – measure of damages- interest on damages- does compromise bind the owner of the property.

Cases/Texts Referred To:

Clarke, M. A "The Law of Insurance Contracts", Third Edition, London, 1997.

Westminster Fire Office v. Glasgow Provident Investment Sy (1883) 13 App Cas 699.

Anctil v. Manufacturers' Life Ins Co [1899] AC 604.

Ebsworth v. Alliance Marine Insurance Co (1873) LR 8 CP 596.

Boulton v Houlder Bros & Co. [1904] 1 KB 784.

Legislation:

The Consumer Credit Act 1999 ("CCA"): S. 80

The Fair Trading Decree 1992 ("FTD"): Ss. 54, 55, 126(2), 127(3), and 127(5).

The Background

1. We have all heard of fire breaking out at Diwali nights and engulfing houses and people. The night of Diwali, on 26 October 2003, was indeed one of a nightmare for the plaintiff and his family. His three storey house caught fire from a neighbouring property. Except for any lives and a refrigerator, the plaintiff lost everything he had had.

2. The property is described as Native Lease No. 20503 being Lot 64 as shown on Lot 9, Seaqaqa Township in the province of Macuata in the island of Vanua Levu containing 22.

7perches. The building on the property was used for commercial and residential purposes.

3. The property was under mortgage to the Bank. The Bank had a first registered charge over the same. The 2nd defendant was the insurer of the property. The maximum cover was for $240,000.

4. The Bank settled the claim for loss in the sum of $79,000 without reference to the plaintiff. The settlement sum was less than the mortgage debt and the value of the loss. To recover the shortfall, the plaintiff entered into a sale and purchase agreement with the 4th defendant which was subject to the plaintiff's right to redeem the debt.

5. The plaintiff then obtained an injunction from the Court stopping the mortgagee sale. The injunction is intact and its fate will be determined upon the determination of the matter.

6. The plaintiff's case arises out of the actions of the Bank in settling the claim with the insurance company without reference to him and at a sum lesser than the value of the loss.

7. The plaintiff says that at the time of advancement of the monies, the plaintiff had arranged and nominated its insurance company being Tower Insurance as its nominated insurer to provide a comprehensive insurance policy in the event of any loss to the plaintiff as described in the policy.

8. Prior to year 2001, the plaintiff says that he had insured all his improvements on the said property to Tower Insurance and had paid his necessary premium to seek indemnity in the event of loss sustained by fire and other risks as prescribed in the policy of insurance.

9. Sometimes in year 2001, before the expiry of the policy of insurance from Tower Insurance, the Bank informed the plaintiff that it had arranged and nominated its own insurance company namely the 2nd defendant to provide cover to him for a sum of $240,000 in consideration of premium in a sum of $1,680.

10. The plaintiff says that he accepted the Bank's proposal for arrangement of insurance with the 2nd defendant and further authorized it to deduct the premium from his account to provide indemnity up to the sum of $240,000.

11. In consideration of the premium paid by the plaintiff to the 2nd defendant, the 2nd defendant agreed to indemnify the plaintiff in respect of any loss or damage to the building, fixtures, chattels, equipment, plant & machinery and stocks to the extent of $240,000.

12. The Insurance Company issued to the plaintiff an insurance policy through the Bank and the same was retained by the Bank.

13. Due to the fire, the plaintiff says that it suffered loss or damage to the extent of $267,000 which were made up as follows:

(i)	***Cost of reconstruction of the building***	***-***	***$150,000.***
(ii)	***Household Items***	***-***	***$ 20,000.***
(iii)	***Fixtures and Fittings***	***-***	***$ 25,000.***
(iv)	***Personal Chattels***	***-***	***$ 15,000.***
(v)	***Stock***	***-***	***$ 35,000.***
(vi)	***Plant & Machinery***	***-***	***$ 12,000.***
(vii)	***Cash***	***-***	***$ 10,000***

14. The plaintiff says that he notified the defendants of the loss by fire. The Bank had promised, assured, undertaken and made representation to the plaintiff that it would have the plaintiff compensated for the actual loss sustained by him.

15. On or about 16 November 2004, the Bank advised the plaintiff that their insurance broker namely Marsh Limited had finalized a settlement figure with the Insurance Company in the sum of $79,000 and requested the plaintiff to indicate his acceptance by

signing a memorandum of agreement before a Justice of Peace or Commissioner for Oaths.

16. Upon receiving the letter of 16 November 2004, the plaintiff did not accept the settlement figure and categorically rejected the same by advising the Bank in writing by a letter dated 26 November 2004 that the loss sustained by him was in excess F$240,000.

17. The plaintiff says that he also informed one Elvira Hazelman Koroi Adi, an employee of Marsh Limited that the settlement figure proposed was not acceptable and that it should pay for the actual loss sustained.

18. Subsequently, the Bank and the Insurance Company settled the claim at $79,000 without informing the plaintiff.

19. The plaintiff says that the Bank was under a contractual and or legal duty to take reasonable skill and care to ensure that the plaintiff was adequately compensated for the said loss sustained by him but it failed to do so.

20. The Bank breached its duty by failing to exercise due care, skill and diligence to ensure that it honored its contractual and/ or legal duty, representation, statement, promise, assurance and undertaking given to the plaintiff and by reasons of its negligent, deceptive, false and/or fraudulent statement, the plaintiff has suffered loss and damages.

21. The plaintiff says that the defendant is proposing to sell the property in the sum of $33,000 to the 4th defendant. At the time of the loss, the mortgage debt was in the vicinity of $100,000.

22. The plaintiff says that he is entitled to sum of $240, 000 for the loss sustained by him to be paid by the Bank under the policy of insurance upon payment of which the Bank would have been entitled to have the mortgage debt paid leaving a balance of at least $140,000 being surplus to the plaintiff.

23. The defendants had been advised that the plaintiff was willing to reconstruct a building on the said lease upon payment of his insurance claim.

24. The Bank is not entitled to sell the property by way of mortgagee sale without having the plaintiff adequately compensated. The Bank is guilty of delay in having the claim processed and the plaintiff is incurring continuous loss to his business.

25. The action of the Bank is unjust, unfair, unconscionable and in breach of its contractual and legal duty of care to the plaintiff and in breach of ss. 75, 76, 80, 81 and 83 of the CCA in that the plaintiff was not provided with the statement of payout figure after the monies were received by the Bank from the Insurance Company and that the plaintiff was not provided with a default notice in accordance with s. 80 of the CCA. The Bank has thus committed an offence and the plaintiff is entitled to be indemnified under ss. 100 to 105 of the CCA. The 1st defendant has also breached ss. 54 and 56 of the FTD.

26. The plaintiff says that there existed a legal relationship of proximity between the plaintiff and the Insurance Company having regards to the facts.

27. The plaintiff therefore seeks the following relief:-

(i) A declaration that the 1st defendant has breached ss. 100 to 105 of the CCA.

(ii) A declaration that the plaintiff is entitled to be indemnified under part 6 Division 1 of the CCA.

(iii) A declaration that the plaintiff is entitled for compensation under s. 98 of the CCA.

(iv) Judgment for a sum of $140,000 against the defendants'.

(v) Judgment for loss of business at the rate of $15,000 per annum.

(vi) General damages.

(vii) An order that the 1st defendant discharges the mortgage over the said property.

(viii) Alternatively a declaration that the defendants have breached ss. 54 and 56 of the FTD.

(ix) A declaration that the plaintiff is entitled for compensation under s. 7(1) of the FTD and an assessment of such compensation be made by the Court.

(x) Interest at the rate of 13.5 % per annum from 26 October 2003 or such other date as the Court may decide.

(xi) An injunction restraining the 1st defendant from exercising its powers of sale of the property.

(xii) Costs on full indemnity basis.

1st Defendant's Defence and Counter-Claim

28. The Bank admits that the plaintiff was the registered proprietor of the property and that it had a first registered mortgage over the said property which was destroyed by fire on or about 26 October 2003 and the plaintiff notified the defendants of the loss by fire. The property was sold to the 4th defendant under mortgagee sale in the sum $33,000. The defendant had always informed the plaintiff that it intended to exercise its rights of mortgagee sale when he had defaulted in the loan payment.

29. The Bank says that the plaintiff had allowed the insurance with Tower Insurance to lapse which was contrary to the loan agreement. It was a term of the loan that the plaintiff insured the property. He defaulted in his obligation to do so and also defaulted in his repayments. As a result of this default, the Bank took out an insurance cover over the said property as the insured and the plaintiff had no right in respect of the insurance policy.

30. As at 7 January 2009, the plaintiff owed the defendant a sum of $153, 740. It accepted from the insurance company a sum of $79,000 on the insurance cover. It was not under any obligation to the plaintiff to obtain an agreement from him to accept the said sum. The plaintiff also cannot dictate to the mortgagee as to how the said monies were to be applied.

31. The plaintiff's claim is statue barred.

32. Except for the specific admissions, the 1st defendants denied each and every claim made by the plaintiff.

33. The 1st defendants counterclaim is that as at 31 January 2006, the plaintiff is indebted to the 1st defendant in the sum of $101,950.92 being the balance amount owing with interest accruing at the rate of 8.25 % per annum and the plaintiff ought to pay this amount to the Bank.

2nd Defendant's Defence

34. The Insurance Company denied the claim of the plaintiff and stated that the plaintiff had used the property for commercial purposes whilst the insurance policy provided for a residential cover. It admitted that the plaintiff paid the premium through arrangements with the Bank. The insurance cover did not cover the contents in the premises. The loss by fire was covered but there were certain exclusions under the terms and conditions of the cover.

35. The property caught fire and the plaintiff submitted an insurance claim form with the Insurance Company. It says that it does not know what transpired between the parties but that it was approached by Marsh Limited and the Bank and was informed that the parties had agreed to settle the matter for a sum of $79,000. A form of discharge was signed by the Bank before the settlement funds were released to the Bank. The plaintiff had informed the Insurance Company that he had no intention of reinstating the property.

36. Since the claim was settled between the insured and the Bank being the insurer, it ought not to have been made a party to the proceedings.

Plaintiff's Reply to Defence and Defence to Counter-Claim

37. The plaintiff stated that his equity of redemption cannot be decided with reference to the sale and purchase agreement between the Bank and the new buyer but with reference to the law. The plaintiff never allowed the insurance on its property to lapse. The Bank had advised and informed him that it had arranged and nominated its own insurance company and that the premium would be deducted from the plaintiff's loan account.

38. The policy of insurance was issued for the benefit of the plaintiff except that the Bank was entitled to receive monies from any claim equivalent to the outstanding debt. Any further sums beyond the mortgage debt belonged to the plaintiff. The insurance policy states that the plaintiff is the insured. The Bank did not have any insurable interest. The policy was always for the benefit of the plaintiff. The Bank was not entitled to accept payment under the policy and bring the policy to an end.

39. The mortgagee sale was done without the plaintiff's knowledge or any prior notice to him in breach of ss. 77 and 79 of the Property Law Act. The mortgagee sale has not been completed and he is the registered proprietor of this property.

40. After the loan agreement was finalized, the 1st defendant had informed the plaintiff that it had arranged and nominated its own insurance company and he was promised and assured by the Bank that it would keep the property insured and undertook as well as promised and assured the plaintiff that it would regularly and punctually pay all the premiums and would not allow the policy to end without prior notice in writing to the plaintiff.

41. All the insurance premium was deducted from the plaintiff's loan account. The 1st defendant is therefore stopped from claiming that the policy was for its benefit. The plaintiff was never informed or advised that his policy had lapsed requiring him to pay the premium and to make his own arrangements. The plaintiff relied on the, assurance and promise of the Bank which took place in the course of the dealing between the parties.

42. The plaintiff says that he is not in any way indebted to the Bank.

The Evidence

PW 1 - Mohammed Alam - Examination in Chief

43. The subject property in Seaqaqa was over a commercial lease. The property had a three storey building and had a store too. The property was built in 1994 on loan from ANZ.

44. In 2000, he changed the financier because the Officers of the Bank had come to his place and asked him if he could take the loan from them because everything was good in their Bank. He considered their proposal.

45. Sometimes in 2000 or 2001, the Bank Officers called him to the bank. He went. He filled in the forms with the assistance of one Niwasan. The Officers' said that they will give the loan to him and insure the house too. They requested for a valuation. He provided one to them as with ANZ loan his house was insured too.

46. With ANZ, the insurance company he had was Tower Insurance and since the policy was fully paid up, the Bank took over the loan. The policy was intact then. The settlement with ANZ took place in year 2000. He then started making payments to Bank

47. Later the two officers from the Bank came to him again. It was Niwasan and 2 other boys. They told him that since they gave the loan, it was good to have the insurance with them too. They told him that it is good to have the loan and insurance from one place. They also told him that the policy conditions were better with them than with Tower Insurance.

48. He asked them what was covered and they told him that perils such as earthquake, fire and likewise were covered. Nothing was put in writing. They gave him a paper to tick. He cannot read. They told him that everything was alright.

49. The plaintiff said that the bank officers' gave him a letter dated 12 December 2001 and asked him to sign the same. He opted to pay the premium from his account. The letter was tendered and marked as ***P EX – 1***.

50. The Bank said that it will insure on its own and renew the policy once it expired. It wrote to him on 15 March 2002 and informed him that it had renewed the policy and debited his account. The letter was tendered as ***P Ex- 2***.

51. In 1999, he had obtained a valuation. The Bank had accepted that valuation. The valuation report states that the property is a commercial lease. The valuation report was tendered as ***P Ex – 3.***

52. At the ground floor he had a grocery shop. He used to sell chicken, freezer goods, fresh fish. He had 6 freezers out of which 5 were of 5 ft and one was 4 ft. His shop was running well.

53. On the second floor was a billiard centre. He had 4 billiard tables. On average, 1 billiard table made an average of $35-$40 per day. He had purchased one table at $1,800 from Suva.

54. On the third floor was the house where they lived. There were 4 bedrooms in the house. His family lived in the house being his wife, son, another son with his wife and children and him. At that time only one of his sons was married. The partitions in the house were of yaka. His furniture was of yaka too. All the rooms had built- ins. There were beds and TV in all rooms.

55. The house was destroyed by fire on 26 October 2003. He was not at home when the fire broke out. He was admitted to the hospital as he had had a heart attack. He was told that he had two blocked veins. His wife told him that fire escaped from the neighbours house, from their ceiling. When he came home nothing was left except for one fridge. All the clothes were damaged too.

56. He went to Niwasan from the Bank and told him about the incident. Niwasan and another person came to his house, took photographs, asked him what all was lost, he told them, they told him that they would lodge a claim in Suva and let the insurance company decide. He was told that Suva will pay for his loss. He never filled in any claim form because he was not asked by them to do so. They told him that if the insurance company comes then he has to sign. After that two white men came. They noted the damage and destruction. The he received a call from Suva when Niwasan told him to get two quotes from the carpenters. Niwasan never told him that he would not be paid or paid partly. Next day health people also came.

57. On 4th December 2003, he received a letter from McLarens Young International-Suva. The letter asked for two quotations from local builders on the costs for repairs of the house. The letter was tendered as ***P Ex- 4.*** He provided two quotations, one from Swamy's Construction dated 5 February 2004 which stated that it would cost $153,000

and the other from Prem's Construction which stated that the total cost for rebuilding would be $149,000. The two quotations were tendered as ***P Ex-5 and 6.***

58. At that time he wanted that the building be reconstructed. Neither the Bank nor the insurance company got back to him about reconstruction. He had no alternative to live anywhere else so they stayed downstairs of the same building, the ceiling of it leaked. He kept going to the Bank and was told to keep checking. He used to check once in every two to three weeks. Whenever he went, he was told that it did not receive anything from Suva.

59. The insurance company did not ever get the house rebuilt. He did not get paid for his loss. The Bank told him that it will get $79,000 and asked him to sign. He told the Bank that he cannot make the building in $79,000. The Bank then accepted $79,000 and advised him on phone of that. He did not like that. He enquired from one worker in Suva who was a manager before and he said that they have accepted the money but will not reconstruct the building. He did not like it.

60. He was not told that they will sell the building too. One boy told him that he read in the newspaper that his house was on sale. He enquired with the Bank and was told that because in the shortfall in the mortgage debt, the bank will have to sell the property.

61. He got a lawyer to get an injunction against the Bank from selling the property. Before the house was destroyed, he was never given a copy of the policy by the Bank. His lawyer got a copy form the Bank though. He tendered a copy of the proceedings as ***P Ex-7*** and stated that he obtained a copy from his lawyer after the proceedings were filed.

62. On 5 November 2003 McLarens Young International provided a preliminary report to the insurance company wherein it stated that the policy cover was for $240,000. The report was tendered as ***P Ex-8.***

63. On 11 December 2003 McLarens Young International prepared a report which was tendered as ***P Ex-9.*** Another report was prepared on 30 January 2004 and that was tendered as ***P Ex- 10.*** A final report was prepared on 23 February 2004 in which McLarens recommended that an offer of settlement be put forward in the sum of

$145,000. The conditions of the settlement were Banks acceptance and approval and a signed discharge by the third party. The report was tendered as ***P Ex-11.***

64. The Bank did not ask him about fixtures and fittings that were destroyed in fire. It was valued for another $25,000, furniture valued at $20,000, stock in the shop valued at approximately $55,000, freezers valued at $10,000-$15,000. He lost some cash too belonging to one Richard Du.

65. After the house was burnt, he did not make any repayments to the Bank. There were ongoing discussions between the Bank and him. The Bank did not say anything about the arrears. The Bank had said that it would reconstruct everything like before. They did not ever say that he could not claim insurance. They never told him that if they received money they will use the same and sell the house or that the house was being put on tender or that the 4th defendant had tendered for the house. The Bank knew of the loss by fire. If he was paid the amount for repair of the house, he would be very happy. The contractors had told him that it would cost him more than $150,000 to reconstruct. That was excluding the furniture. The built-ins would cost another $30,000.

66. He did not receive any money from the insurance cover. The Bank did not ever tell him what was going on with the brokers. They did not talk about any mistake in policy. In 2012, it may cost him more than $260,000 to reconstruct the same building. He recently obtained a quotation from a builder. He has claimed for $140,000 plus the interest. He had lost his business too. He is also asking the Court that the mortgage be discharged. If the Bank obtained true value from the insurance company, the debt would be cleared and he would also get some money for himself. The Bank did not do its work properly and so he wants to be compensated.

67. The police report never blamed him for the fire. Apart from his house, 3 other buildings got destroyed that night. The Bank did not ever tell him that the insurance policy was theirs and that he had nothing to do with it. When the policy was obtained, he was told that he will receive the benefits if anything happened like earthquake and fire. He also asks for damages and costs.

Cross-Examination (By D1)

68. The plaintiff identified in the application for consent to mortgage dated 23 February 2000 his signature and that of his lawyer's signature in the mortgage dated 24 February 2000. He also identified his signature in the mortgage document. He stated that he signed the mortgage before his lawyer.

69. He agreed that he wrote a letter to the Bank on 21 May 2002. He also agreed that he wrote a letter to the Bank dated 1 February 2003 where he wrote and informed the Bank that his vehicle was damaged by flood and requested that his loan repayments in respect of the vehicle be delayed.

70. He used two floors for business. From ANZ, he had borrowed $120,000. He used the money to construct the building. The building was also to be used for grocery shop and billiard. He did not use the money from ANZ to buy groceries for selling. All the money was used for building the house.

71. He was a mechanic. He still does mechanical work from the same property. He did that from before he took loan from the Bank and continued after he got loan. He continued this business since he resigned from PWD in 1996. The business he had was for groceries, billiard and sea slugs.

72. He sighted ***P Ex-1*** and stated he cannot see the same properly because he has bad eyesight and he left his glasses at home. He said he saw the letter for the first time that day. He said that he also saw ***P Ex -2 to P Ex-11*** for the first time that day.

73. He remembered signing the mortgage before his lawyer. His lawyer explained the documents to him. He recognized his signature in the letter from the Bank dated 11 January 2001. The date of his signature was 24 January 2001.

74. After he took loan, the Bank used to send him statements from time to time on his Postal Office Box. No. 83 - Seaqaqa. He cannot remember how frequently he used to get the statements but said that it may have sent the statements about 10 times. He then said that he cannot remember how many times he got the statement but it was more than once. He could not say whether it was more than 5 times. His monthly repayment he

said was $1,500 and something. He was punctual with his payment but when he got sick then for 1 or 2 months, he could not pay. He got sick from 1996 until date. He paid all monies to ANZ, even though he was sick. He used to pay from business. He looks at the transaction history issues by the Bank for the period 1 January 2000 to 13 January 2010 and stated that they appear in small prints and so he cannot read the same.

75. He looked at the default notice dated 4 December 2000 issued by the Bank pursuant to s. 80 of the CCA and stated that he cannot remember whether he received it or not and that he may have received it.

76. He looked at the summary of cover and said that he had not seen that before. The first time he saw that was on that day. He looked at the letter dated 12 December 2001 from the Bank to him and the summary of cover and said that he was happy with the letter dated 12 December 2001 because it states that the cover was for $240,000. He stated that he did not know what the summary of cover was. He said that if he was given the two mentioned documents, he would have received it and if the Bank gave the letter, it would have given the summary of cover too.

77. The Bank did not ever tell him that it was selling the property. He did not try to find a buyer for the property. Fijian Provincial Council wanted to buy the property. He did not want to sell because he did not have a place to live in.

78. He stated that the letter written on his behalf to the Bank on 21 May 2002 was done by Niwasan who had told him that he would benefit. He signed the letter. He told Niwasan that he would not sell. One person in Ravuka Bridge wanted to buy.

79. He looked at the letter by the Bank to him dated 4 June 2002 and stated that he did not remember receiving it. He saw the default notice by the Bank issued pursuant to s. 80 of the CCA dated 23 September 2002 and stated that it was addressed to him and his postal address was noted in the notice.

80. He said that he had a car loan with the bank for CK 159. He paid the Bank. Only one of his vehicles was mortgaged. CQ 506 was a small van which was used for sea slugs. CK 159 was also a van.

81. He saw a letter written by one Maika Noa Maiwalu from Naravuka village who wrote to the Bank on 9 October 2002. He stated that he knows Maika but he does not know anything about the letter.

82. He looked at the letter dated 25 November 2003 from the Bank to him and pointed out exactly the place where it was written ***"House Insurance Renewal"***. He said that he did not recall receiving the letter. He saw the 4th page of that letter with heading ***"Summary of Insurance Cover"*** in bold letters and pointed to where it appeared on the document.

83. He said that he came to sign a caveat in his lawyers' office. Before that he knew about the sale of his property to the 4th defendant. He does not know whether someone by the name of Shiu Prasad offered to buy his property at the sum of $51,500 but he was told by a boy from Seaqaqa that it was in the papers. He cannot recall when the boy told him. He stated that he did not recall receiving a letter from Lateef & Lateef Lawyers. He looked at a letter written under his name to Lateef & Lateef dated 24 May 2005 and denied that he had signed the same.

84. He did not take steps to rebuild the house somewhere else because he did not have land to build on.

85. He did not recall receiving a default notice issued by the Bank under s. 80 of the CCA and dated 5 February 2002. He also could not recall receiving another notice dated 4 December 2000 but he said that he may have received it.

Cross- Examination (By D2)

86. He was formerly a client of ANZ. He had arranged an insurance with Tower on his own. He cleared ANZ mortgage. The cover by Tower continued for a short period. He has ticked the option that the Bank would pay premium and charge to his account. He is not sure whether that document he ticked was a letter dated 12 December 2001 from the Bank. He cannot recall whether that is the letter he ticked. He said he was sure that he did not see the summary of cover. He said that he did not receive the documents addressed to his postal address. The two quotations he obtained were to rebuild the

house. He does not know whether that involved demolition. He always wanted to rebuild. He did not tell the Bank in 2004 that he did not want to rebuild. He did not recall seeing any default notice. In his postal box, he just saw the bank statements which showed the transactions and that he owed money not that he had arrears. The Bank told him that contents were covered too. He did not see the policy but relied on what the Bank told him.

Re-Examination

87. The documents shown to him by counsel for the Bank were photocopies. He cannot recall whether the originals were sent to him and if it were, it would be destroyed by fire. When one Niwasan and another bank officer came to see him and asked him to tick a proposal, that document did not look like ***P Ex -1***. It had a letter head with big letters underlined. That is the one he signed.

PW 2 - Mohammed Azam Alam - Examination in Chief

88. The second witness for the plaintiff stated that he is the son of the plaintiff. In 2003, he lived in seaqaqa in his father's house. He lived with his parents. He was then married and had a child. On 26 October 2003 the house caught fire. He was in the house. It was 2am when the house caught fire. The fire had started from the property beside his house. The shop from which the fire started was owned by one Naidu. They were not able to save the house. They had to get out of the house from the downpipe. The occupants at that time were his mother, brother, wife, son and him. They used to live on the top floor. The middle floor had billiard tables and the bottom floor had a shop.

89. This witness was not cross-examined by anyone.

PW 3 - Sam Ming - Examination in Chief

90. The third and the final witness for the plaintiff testified that he is a builder for the past 30 years. He said that he has built uncountable houses. He would have built more than

200 houses. He has built all kinds of houses- small and large for example in Labasa he built a house opposite the police station which is 25m x 40m.

91. He was known to CNB from 2000 onwards. He may have worked for many bank officers but he cannot remember the details. At that time he had an account in the Bank. In 2000, he was called to assess the damages. He looked at the structure then which could have been repaired at the time. The existing structure could have been used. Now the structure has to be demolished. A week before the trial he had carried out the inspection. He was also called to give a quotation to rebuild the structure. There are other houses around the building. The bottom floor is 19.5 m x 13.6m. Initially the material was wooden and concrete. There were 2 floors and 3 storeys.

92. Before the building was burnt he had seen the same. It was a beautifully designed house. To repair the building now, it would roughly cost $240,000 to $250,000. In this sum he has included the costs for built-ins and partitions. The wood that has to be used is Dakua or Salusalu because yaka now is hard to get. It is a rare species of timber. One can get Dakua and Salusalu anytime. Part of the structure needs demolishing. The 2nd floor needs demolishing because there are cracks and water seeps from the floor. The steel has corroded too. The building is not safe and for health and safety reasons, it has to be demolished. The top floor needs renewal. The walls have to be redone and replaced. There are no doors and windows left. A new roof has to be made. The top floor basically needs complete doing. 1st floor needs some repairs. Water seeps in but the entire floor does not need to be replaced. The bottom floor needs repairing. The walls need to be done.

93. In 2003 he had done an estimation of the costs for repairing the building. It would have cost $160,000 at the time. The costs of materials were cheaper then. He looked at ***P Ex 5*** and 6 and said that it should have been $165,000. It could have been $150,000 that time. Now the cost of material, labour, and camping is more. Now, comparatively, more work needs to be done as at that time, the floor could have been salvaged.

Cross-Examination (By D1)

94. A week before the trial he was requested by the owner of the building to carry out the inspection. Mohammed Alam Khan is the owner. He gave a written report after the inspection. The date of the report is 24 September 2012. He gave it to Alam Khan. Alam's solicitor did not speak to him about a particular report. He was told by Alam and not his solicitor that he would have to give evidence in Court.

95. This witness was not cross-examined by the remaining defendants.

Re-Examination

96. In re-examination, the witness stated that he is happy to disclose the report if needed.

D1 W1 - Kevin Yuen - Examination in Chief

97. The first witness for the Bank was the manager recovery section of the Bank. He stated that BSP acquired CNB in 2010. He worked for CNB before that. Altogether he has worked for 12 years. He started as collections officer in 2000. He handled all the account which were in arrears. He handled the plaintiff's account from 2003-2007. He had the benefit of reviewing the plaintiff's file. The Bank file contains contract, all correspondence, insurance covers, receipts of payments, default notices and everything in relation to the customer. More than one person handles the file. One person has a supervisor and manager. If there is any discussion with the customer, the bank officer takes down notes. Diary notes are entered the same day when information is received.

98. In the Bank's bundle of documents, tab 2 is consent to mortgage. He could see the signature of the plaintiff. Maqbool & Company acted for the bank then. Consent to mortgage was tendered as ***D Ex -1.*** The mortgage appearing on tab 3 was tendered as ***D Ex – 2***. The notice of variation to loan agreement on Tab 4 was tendered as ***D Ex – 3***. The loan agreement between the parties on Tab 1 was tendered as ***D Ex – 4***. The transaction history from 01/01/2000 to 13/01/2010 appearing on Tab 5 was tendered as ***D Ex- 5***. The witness said Exhibit 5 was a duplicate statement. The original statements are sent to

the nominated address of the customers. It is sent either on 6 monthly basis, or on request from customers or when the transactions fills 2 pages. The term *credit* used in the transaction history shows repayments by customers. The witness said that there were no payments made before 29 January 2001. The plaintiff was in default of payments. There are payments made to the account and it can be ascertained from use of the term ***"cash repayments".*** This means that the customer has made cash deposit. There is one cheque repayment which is the proceeds of the insurance. On 30 September 2005 another cheque repayment of $33,333 is shown. That is settlement by the 4th defendant. At the bottom of the last page of the transaction history is a sum of $101,950.92. The bank wrote off that amount because the repayments were doubtful. It is an internal matter for the bank otherwise, the fees and interest continues to accrue.

99. Tab 6 shows a receipt from Maqbool & Company which shows that it received a sum of $121,000 from CNB, a sum of $119, 472.26 was paid to ANZ and the balance of $1,528.74 paid to Maqbool & Company and for stamp duties. Tab 6 was tendered as ***D Ex- 6***.

100. On Tab 8 is a letter to the plaintiff dated 16 June 2000 which is informing the customer that his account was in arrears in the sum of $1249.99. Tab 8 was tendered as ***D Ex- 8***.

101. On Tab 10 is a letter to Maqbool & Company through which the Bank encloses a cheque for the sum of $1970 being the solicitor's fees for security documentation. Tab 10 was tendered as ***D Ex -9***.

102. On Tab 11 appears the default notice under s. 80 of the CCA. The default was from May till November in the sum of $8,750. The notice is informing the customer to pay up or the bank would exercise its rights under the security. Tab 11 was tendered as ***D Ex- 10***.

103. The plaintiff's loan was a home loan and not a commercial loan. The loan contract says that it is home loan. The plaintiff did not tell the Bank that he will use the loan for commercial purpose so they assumed it was home loan.

104. On Tab 12 is a letter from the Bank dated 12 December 2001 which is informing the plaintiff that the Bank will provide the insurance cover for the property. In the letter it says ***"policy details: refer summary of cover attached"***. The summary of cover appears on Tab 13. The letter on Tab 12 would have had Tab 13 attached to it and gone out as

one document. Tab 12 and 13 were tendered as ***D Ex – 11*** and ***12*** respectively. The summary of cover does not show that the plaintiff is the insured.

105. On Tab 14 appears the default notice by the Bank under s. 80 of the CCA. The default is for 2 months and the amount in default is $2,815.00. The notice is dated 5 February 2002 and allows for 30 days to make the payments. Tab 14 was tendered as ***D Ex – 13.***

106. On Tab 16 is the summary of cover which was tendered as ***D Ex – 14***. In the summary of cover, the insured is the bank.

107. On Tab 17 is the advertisement of the property by the mortgagee for sale. The advertisement is dated 24 April 2002. There was another advertisement in daily post. They looked for that advertisement but could not obtain a copy because daily post does not operate anymore. Tab 17 was tendered as ***D Ex- 15.***

108. On Tab 18 is the letter written by the plaintiff saying that the plaintiff has found a customer who had agreed to take over the loan debt repayments. Tab 18 was tendered as ***D Ex – 16.***

109. Tab 20 contains another default notice issued pursuant to s. 80 of the CCA dated 23 September 2002. That default notice was in relation to his car loan. The total amount of default was $1,500.01. From his recollection, the bank sold the vehicle under the bill of sale. Tab 20 was tendered as ***D Ex – 20.***

110. On Tab 22 appears a letter written by the plaintiff dated 1 February 2003 asking for approval to delay loan repayment because the vehicle was under flood. The vehicle was CK 159. Tab 22 was tendered as ***D Ex – 18***.

111. On Tab 25 appears a mortgagee sale advertisement in the Fiji Times of 26 February 2005. The Bank did more than one advertisement. One another advertisement was in daily post but they cannot retrieve the same. Tab 25 was tendered as ***D Ex – 19***. On Tab 26 appears a tender of the property from the 4th defendant which was made in response to the advertisement for mortgagee sale. Tab 26 was tendered as ***D Ex- 20.***

112. Tab 27 is a tender by one Shiu Prasad in the sum of $51,500. This tender was hand delivered to Niwasan Naicker prior to re-advertising the property for mortgagee sale.

The Bank attempted to contact Mr. Shiu Prasad and told him that it will re-advertise and he could put his tender again. He did not. The Bank contacted him and could not get him. Tab 27 was tendered as ***D Ex – 21.***

113. Tab 28 is an eviction notice dated 12 April 2005 to the plaintiff. Tab 28 was tendered as ***D Ex – 22.*** Tab 30 is a letter by the plaintiff in response to the notice to vacate which was tendered as ***D Ex- 23***. Tab 31 is a transfer of the property to the 4th defendant. Tab 31 was tendered as ***D Ex- 24***.

114. The witness said that they had a bank officer called Niwasan. He left the bank in the year 2009. He migrated to USA. They do not have his contact.

115. In respect of ***P Ex – 8 to 11***, the witness stated that he has not seen the documents before. They are not in the Banks file. The Bank is the insured according to their policy. The policy did not have cover for the contents.

116. The Bank had lodged claim through its brokers. The Insurance Company inspected the property and they responded that the property was used for commercial purpose and the cover was for domestic purpose. Due to their long standing relationship, the insurance company decided to honour the claim. They sent assessors to Labasa. Quotations were obtained as per the requirement. The insurance engaged its own assessors. The insurance company came to a final amount of $79,000 to pay the bank.

117. The amount of monies owed to the bank is $101, 950.92 and on that amount interest accrues at 8.25%. The annual interest rate is calculated by multiplying the interest rate with the outstanding balance (8.25% x 101,950.92), the sum divided by 12 is the monthly interest rate. The monthly rate has to be multiplied by the number of months from October 2005 till date.

118. The Bank was not aware of the terms and conditions of the policy of Tower Insurance. That policy came to an end on 27 January 2001. CNB did not have its interest insured at that time after 27 January 2001 until January 2002, because the property was not insured.

Cross- Examination (By P)

119. The witness stated the loan was given to refinance the ANZ debt. The security was the property in Seaqaqa. The property had a Native Lease with a term of 99 years. The zone type was commercial. The loans officer visited the property and there was shop on the bottom floor and billiard table on the second floor. A store is classed as commercial. The Bank would have taken into consideration how the money was to be paid. The source of repayment was that the plaintiff was a businessman. The shop is in the wife's name. The source of the money from the plaintiff was some fishing activity. On its visit, the Bank would have seen the business. The plaintiff had to provide the insurance. The first drawdown was on 22 February 2000. At that time there was an existing insurance cover. It was a requirement of the loan that the plaintiff provide a cover with the mortgagee's interest noted in it. The cover was initially provided by the plaintiff but not given to the Bank. Bank relied on the solicitors and gave the money to the plaintiff because solicitors protect the bank's interest. There was no certificate by the solicitor. To the satisfaction of the solicitors, there was a cover. The Bank assumed there was a cover. The cover expired on 27 January 2001. He can say that because he managed to extract the date from the documents provided by the solicitors for the plaintiff. The Bank wrote ***P Ex – 1***. The first sentence says that the insurance cover was due for renewal on 31 December 2001. It is not correct that the plaintiff did not have insurance for one year. The offer letter says that the amount of cover would be $240,000 and the premium would be $1,440.00. This letter was not taken to the plaintiff. The customer had an option to pay the premium directly or have his account debited by the Bank for payment of premiums. In this case the customer's account was being debited.

120. When the option was given to the customer, he did make an option. The letter would have been on a letter head. He has seen the policy later. The customer was given a copy of the policy but when Mr. Sen asked him when he was given a copy; there was no answer from the witness. He then said that he has not seen the actual policy. When he was going through the evidence, it was provided by the insurance company. There is no letter in the Bank file which says that the copy of the policy was sent to the customer. He would not know whether the policy would be sent to the customer because another

department deals with the issue. Under the head insured, the use of the word ***"others"*** would mean anyone having interest and it would include the owners. The terms ***"basis for settlement"*** meant on the banks basis. The cover was provided by the insurance. The loss would be reinstated or replaced by the insurance. Bank had filled the proposals for the insurance company. A copy of that proposal should have been given to the plaintiff. There is a procedure to send the proposals. He would have perused the Bank files. There is no copy of what was sent. The word ***"you"*** under claims procedure in the summary of cover means the Bank. When the policy comes up for renewal, a new form is not filled. He cannot show any changes in condition so the conditions in summary cover will apply in 2003 too. The insurance officer of the Bank would have filled the proposal form. There was no signature of the plaintiff. The Bank would have inspected the property. It sought residential cover because the property was partly residential. He could not answer why a commercial cover was not taken. After the house was destroyed by fire, the Bank still proposed to have the property insured. There was no insurance but a proposal. The Bank did not proceed to mortgagee sale after advertisement in the Fiji Times of 24 April 2002 because it did not receive any interest from anyone. As bank officers, they are required to compare signatures. The witness said that the signature on Exhibit 23 is similar to other signatures of the plaintiff. When he was asked to look at the entire signature, the witness said he did not wish to comment on the same.

121. He said that the contents of that letter were not verified. After the fire, the brokers were informed of the same. The brokers asked them to provide quotes. They did provide it to the brokers. To his knowledge, the ***P Ex- 8 to 11*** were not shown to them by the brokers. He does not know for what amount the claim was lodged by the brokers. He does not know what the plaintiff's loss was. Even from the correspondence, he cannot recall what the loss of the plaintiff was. The Bank's entitlement to the claim was the total loss. The claim was lodged without the amount of loss. The quotes provided the loss. They also depended on broker's assessment. The claim for loss by the brokers was $130,000 to $140,000.

122. The witness said that he was responsible for dealing with the claim. He relied on quotes to say that the loss or claim was $149,000. The Bank was selling the property so the

plaintiff's loss was not taken into account. The default was two years prior to the fire. There was an intervening loss for which they would sell the property and claim loss from the insurance. The second advertisement in 2005 gave them the right to sell. Between 2003 to 2005, they were trying to sell the property on AS IS WHERE IS basis. To sell in 2003, they relied on the advertisement of 2002. The tenders had closed by then on 8 May 2002. The witness said that on 4 May 2004 he wrote an email to the insurance company wherein he stated that the Bank will accept the sum of $149,000 as replacement/repair costs and that the sum of $79,000 was not accepted. He did not get a figure of loss from the plaintiff as he visited the insurance company. The email was tendered as ***P Ex- 12***.

123. By his diary note of 10 January 2005, he had recommended that the figure of $79,000 be accepted by the Bank. The diary note was tendered as ***P Ex 13***. The insurance company did not pay because the issue was that the property was commercial instead of being residential and one of the reasons why they accepted $79,000 was that there was material non- disclosure. The $79,000 was the indemnity cover. Indemnity cover means that no party has claim against the other. Initially the Bank wanted the plaintiff to sign the acceptance of $79,000. They went to the plaintiff to have it signed but it was refused. When that was refused the Bank gave an indemnity and accepted the sum of $79,000. After acceptance of $79,000, the amount owing on the property was $180, 580.09. That included for the vehicle as well. The portion for the housing would be $170,000. If bank paid $149,000, the balance would be $20,000. The plaintiff offered $20,000 to pay off the debt. After the plaintiff had refused $79,000, there was no formal correspondence to the plaintiff from the bank. He may have been probably told that whether or not he accepted the monies the Bank would proceed to accept the same. They believed that it was necessary that the plaintiff provided his consent to the acceptance of the monies. The Bank did not receive actual loss in terms of the debt but one quantified by Bank. They exercised their rights as a mortgagee. He did not compromise the bank's position. He is not a privy to the conversation between the Bank and the plaintiff after the fire. The Bank was still communicating to the plaintiff after the property was advertised because the arrears occurred 2 years prior. The brokers had asked the plaintiff for quotes. The Bank did not make any representations to the plaintiff that he will be fully

compensated for the loss. After receiving $79,000 the previous s. 80 notice was sufficient to continue with the mortgagee sale. There were some issues so the insurance company took time to settle the claim. The issues were as a result of the Bank's conduct. The Bank dealt with the plaintiff after the fire to keep him informed.

124. The notice by the bank of 5 February 2002 shows the total debt at $154,852.74. That is still applicable. The plaintiff paid some money on 26 March 2002 but the notice was still valid. The Bank was the insured and that was the position of the Bank from the beginning. The Bank was not negligent in obtaining a policy. The Bank did not compromise the plaintiff's position by accepting the sum of $79,000. The Bank did not treat the plaintiff unfairly. It was represented to the Bank that the wife was the owner of the business but he does not know the actual owners name.

Cross-Examination (By D2)

125. In cross- examination by the second defendant the witness stated that the reference to the word ***"you"*** in ***P Ex-1*** is the Bank. The name of the insured in the summary of cover is the Bank. There are no records of any cover after the Tower Insurance cover expired. The debt of $170,000 was Bank's exposure. If the owner wanted to redeem, he would have had to pay $180,000. The 4th defendant has not accepted the settlement and the balance outstanding till date does not include $33,000.

126. After the mortgagee sale advertisement of 26 February 2005, the 4th defendant put in his tender on the same day. He does not know when his tender was received. After the sum of $79,000 was received, the debt would be reduced. There was no demand to pay the reduced debt. There was an eviction notice dated 12 April 2005 by the Bank through it solicitors. He does not know when that letter was served on the mortgagor. There was an attempt to convey the property to the 4th defendant because of the sale and purchase agreement between the Bank and the 4th defendant. The plaintiff stopped the registration of transfer with an injunction. Since the injunction is until the finalization of the case, the transfer is not effected until date.

Re-Examination

127. He now does not think that there was a necessity to get a discharge from the plaintiff for the settlement of the insurance claim. The initial request was to make the plaintiff aware but the Bank could have proceeded on its own. The amount on the cover was not reduced because of the fact that policy was domestic. When the Bank inspects the property, it protects its interest. He has not seen a letter where the plaintiff has ticked the options how the insurance could be paid.

D2

128. The 2nd defendant did not offer any evidence at the trial.

D4 W1 -Mohammed Shaheem Airud Khan – Examination in Chief

129. The 4th defendant gave evidence himself. In his evidence, he explained that in the year 2005 he saw an advertisement in Fiji Times where Lateef & Lateef lawyers had advertised for mortgagee sale. He put in his tender. His tender was considered. Mr. Sarju Prasad was his conveyancing lawyer. He went to sign the agreement and pay 10 % deposit on tender after which the papers were lodged by Mr. Prasad with Lateef's.

130. Sometimes later Mr. Prasad told him that there was a caveat on the said property. All his money was in Mr. Prasad's trust account. When the caveat was withdrawn, settlement was effected. After settlement, Mr. Maharaj lodged the transfer. He was told that the stamp duty by the 1st mortgagor was not paid so he requested for a breakdown. He tendered the letter by the Stamp Duties which was marked as ***D4 Ex 1*** . He paid the stamp duty. He re-lodged the transfer. He paid the stamp duty in the sum of $2175.00. This is apart from the $33,000 that he paid. When he followed up, he was told about the injunction. Sashi Lochan held onto his transfer. The order was placed on the property on 28 August 2006. The settlement was done on 6 October 2005. There was no clause in the sale and purchase agreement to stop the transfer. He could have invested his money in the sum of $33,000. He should be paid interest by the bank at 10 %.

Cross-Examination (By P)

131. Under cross-examination, the witness said that the sale & purchase agreement between him and the Bank was read out to him by Mr. Prasad and the agreement at clause k read that it was conditional on removal of any caveat by the mortgagee if lodged by any person against the title or any court order obtained by the mortgagor restraining the mortgagee from selling the property.

132. The sale & purchase agreement was tendered as ***P Ex 14***. The witness said that the Bank did not offer to give the money back to him. He also did not ask for it back. He wants his money back and compensation too. He is leaving the matter to the Court.

133. There was no cross examination by the other defendants and the 4th defendant did not raise any further clarification upon the cross examination by the plaintiff.

The Law and Analysis

134. This case involves a lot of factual and legal considerations. The parties would have appreciated that. Despite that fact, I am surprised that neither party has drafted the agreed facts and the issues to be tried by the Court.

135. The submissions also address various matters without requiring the Court to deal with specific issues. There is no pre-trial conference minute in the records or copy pleadings. I have attempted to deal with various issues arising out of the pleadings and the trial.

The Parties to the Contract of Insurance

136. The Bank and the Insurance Company both maintain that only they are the parties to the contract and as a result they had the right to enter into a compromise under the contract of insurance without consultation and consent of the plaintiff.

137. The Bank states that the reason why it became the party to the contract is that the plaintiff allowed the Tower Insurance policy to collapse which gave rise to the need for the Bank to arrange an insurance cover to protect its interests.

138. The plaintiff says that the bank officers had come to his house with a letter dated 12 December 2001. They told him that it is good to have the loan and insurance from one place. He was asked to tick the option. He ticked the one for the Bank to pay the premium and charge to his account. He was then sent ***P Ex- 2*** to confirm that the Bank had arranged the insurance and that the premium would be charged to his loan account. The bank officer also told him that they will renew the policy.

139. Upon hearing the oral evidence and perusing the documentation, I find that it is not correct that the plaintiff allowed his Tower Insurance Policy to collapse. Mr. Kevin Yuen is not telling the truth on this issue. He stated under cross-examination that the policy expired on 27 January 2001 and the property was uninsured for one year. Neither party tendered the Tower Insurance policy but the evidence of Mr. Yuen is contradicted by the Bank's own document dated 12 December 2001 being ***P Ex- 1*** and/or ***D Ex-11***.

140. That letter in its first paragraph reads:

" You may be aware insurance cover in respect of your home is due for renewal on 31 December 2001".

141. From that first paragraph, it is apparent that before the Tower Insurance cover could expire, the Bank had given the plaintiff an offer on 12 December 2001 to accept an insurance arranged by it. It is not correct that the Bank had to take such an action because the plaintiff had allowed the policy to collapse.

142. I do not find any credible evidence to contradict the evidence of the plaintiff that he by his options allowed the Bank to arrange a cover, pay the premium and charge the same to his account. The Bank says that it does not have any documentation to that effect but that does not mean that the plaintiff did not act on the offer. The Bank does not have everything in its file. One such example was the mortgagee sale advertisement in the daily post.

143. I find the plaintiff's evidence credible that he authorized the Bank to deduct the premium from his loan account. The plaintiff did say that he saw ***P Ex -1*** or ***D Ex -11*** in Court the day he gave evidence. Those exhibits are one and the same and is a xerox of what the plaintiff was given by the bank officers to tick. The original, as per the evidence,

would have been on the letter head. For an illiterate person what remains in the memory is the look of the document and any outstanding features. I have no reason to doubt the plaintiff's evidence. On the contrary Mr. Yuen was not honest in his evidence. I will, as I go along, highlight other instances where I found Mr. Yuen's evidence inconsistent, evasive, contradictory and incredible.

144. The Bank says that it negotiated a cover because the plaintiff allowed his policy to collapse leaving the Bank's interest unprotected. Even if the plaintiff did this, the Bank's position in terms of nominating the insured would not have changed. The summary of cover as per the Bank's own evidence was attached to ***P Ex -1***. The cover had not expired and the Bank had endorsed the insured to be ***"National Bank of Fiji trading as Colonial National Bank and others as may be declared for their respective rights and interests"***. The Bank always had the intention to name itself as the insured before the plaintiff allowed the policy to collapse or before the plaintiff acted on the offer. The ***D Ex- 12*** which is the summary of cover is evidence of that intention.

145. Now let me make a finding as to who actually are the parties to the contract. Let me first make a finding on law. I will then make a finding of fact.

146. ***"To claim under his insurance the insured does not have to prove his interest. Lack of interest may be raised as a defence by the insurer"***:

Clarke, M. A: "The Law of Insurance Contracts", Third Edition, London, 1997, Pg. 103, Para. 4-1D.

147. ***"The mortgagor of goods retains an insurable interest in the goods even if his debt is greater than the value of the goods insured. The mortgagor of the land retains an insurable interest in the property subject of the mortgage. Even if he has sold the equity of redemption, the property right which most clearly justifies his insurable interest, the mortgagor will retain an insurable interest if he also retains potential liability under the mortgage":***

Clarke, M.A: "The Law of Insurance Contracts", (supra) Pg. 120 at para. 4-5G1.

148. On the law it is clear that the plaintiff had an insurable interest in the property.

149. What can be determined from the facts of the case? I will reiterate that under the summary of cover, the insured is noted as the ***"National Bank of Fiji trading as Colonial National Bank and others as may be declared for their respective rights and interests"***.

150. The term ***"others as may be declared for their respective rights and interests"*** immediately indicates that the Bank is not the only party to the contract. If the Bank was the exclusive party to the contract, there was no need for addition of the words ***"and others as may be declared for their respective rights and interests".***

151. Who does the terms ***"others"*** include? The term ***"others"*** include those who have an insurable interest in the property and clearly by law that is the plaintiff being the owner of the land.

152. The Bank says that the plaintiff has to prove that he is included by the term ***"others"***. The onus of proving that the plaintiff does not have an insurable interest is on the insurer and not the plaintiff.

153. Even if I were wrong in stating the legal position on the onus of proving the insurable interest, there are sufficient evidence on the facts of the case to establish that the plaintiff is a party to the contract.

154. It is undisputed that the plaintiff is the owner of the property which was destroyed in the fire which peril was insured by the Insurance Company. The two people who were at the risk of losing the property was the Bank and the plaintiff so it is not rocket science to make a finding that the term ***"others"*** includes the plaintiff as the person with an insurable interest.

155. What surprises me at this stage is that none of the parties have tendered the insurance policy in evidence. It is in the Insurance Company's agreed bundle of documents but at the trial it did not proffer any evidence.

156. Another piece of evidence upon which I find that the plaintiff is a party to the insurance contract is the 2nd paragraph of the Banks letter dated 12 December 2001. This was tendered as ***P Ex- 1*** and ***DEx-11.*** It reads:

"Colonial National Bank is pleased to advise that it is able to offer <u>you</u> the following insurance cover to protect <u>your</u> interests in your house".

157. The Bank's witness Mr. Yuen said that the words ***"you"*** and ***"your"*** in the above letter meant the Bank. That clearly is a biased statement. I do not know why Mr. Yuen would try to distort what is obvious but any lay person cannot make the mistake that if the Bank is writing to the plaintiff it would not refer to itself as ***"you"*** or ***"your"***. Moreover how can the Bank make an offer to itself?

158. I find that the words ***"you"*** and ***"your"*** meant the plaintiff and that the Bank, by that letter, offered to negotiate a cover to protect its interests as well as the interest of the plaintiff and indeed it secured a cover to protect its interest as well as the interest of the plaintiff that is why it named itself as the insured and ***"others"*** too. If the Bank says that the plaintiff is not included as an insured then the Bank has breached its own offer by insuring the property to the full value and not including the plaintiff as a party to the contract but what remains is that the plaintiff maintains an insurable interest in the property by virtue of the fact that he is the owner of the property with potential liability and by virtue of the fact that the property was insured to its full value.

159. I then move to the summary of cover. This was tendered as ***D Ex – 12***. In that document there is an endorsement under the headings ***"claims procedure"*** and ***"note"***. The endorsement is to the following effect:

" <u>Claims Procedure</u>

In the event of a claim, you are required to attend the nearest branch of Queensland Insurance with a copy of this form within 7 days of the accident. You may contact Mrs. Sunita Reddy on telephone 315455 for queries. No repairs should be undertaken without the insurer's consent. Non -compliance could affect your right to claim under the policy. In the event of any difficulty you may contact our Brokers; Marsh limited on telephone 312799, Yunus Khan or Fiona Kullar.

<u>Note:</u>

The above is a brief summary of your policy. Please refer to the master policy document held by Colonial National Bank for full details, terms, conditions and exclusions of policy coverage"

160. The Bank's witness yet again said that the words ***"you"*** and ***"your"*** means the Bank. This interpretation is absurd. Why would the Bank tell itself to contact its brokers and why would it refer to itself as ***"you"***. I find that the term ***"you"*** and ***"your"*** refers to the plaintiff. Following that finding I find that the endorsement clearly states that the plaintiff had and has a right to claim under the policy as a party to the contract or as a person with insurable interest in the property.

161. Irrespective of whether the plaintiff accepted the offer of 12 December 2001, the summary of cover issued after the policy was secured had the same endorsement under the two headings of ***"claims procedure"*** and ***"note"***. My finding from the summary of cover is that the plaintiff is assured to be the party to the contract with the rights to make a claim.

162. The insurance policy in part reads:

" Other Interests

Where the insured is under an obligation to insure the interest of any person or corporation having an insurable interest in any of the insured property, the company will indemnify the insured and that person or corporation as if a separate policy had been issued to each. However,

(a) the company will not be liable to indemnify any person or corporation whose interest has not been declared to the company by the time indemnity becomes payable; and

(b) the company's liability will not be increased beyond the amount that would be payable if this clause had not been incorporated in the policy".

163. I may appear to be in foul of the rules of evidence in referring to the policy which was not tendered in evidence when it should have been because the entire case is about that document and the parties to the same. When Mr. McDonnell offered not to tender

evidence, I would have expected other parties to have made an application in Court for tendering of the policy through their witness. The existence of the policy is not denied by any party. Even if I am in foul of the rules of evidence, I find that this is a material document which, in the interest of justice, must be taken into account.

164. The endorsement in the policy under the heading ***"other interests"*** clearly binds the insurer to make good the loss of the plaintiff if there is any to be made because it is indisputable that the insurance company was notified of the plaintiff's interest and claim in the property.

165. The preliminary report prepared by the insurer's agent McLarens Young International being reports 1 to 4 dated 5 November 2003, 11 December 2003, 30 January 2004, and 23 February 2004 were tendered as ***P Ex- 8 to 11,*** all notes the insured to be the Bank and the plaintiff.

166. It can be argued that the report is not the contract but it is adequate to make a finding that the insurer recognized that the plaintiff had an insurable interest, a right to make a claim and that his interest was affected by the outbreak of fire.

167. The plaintiff's exhibit ***P Ex-12*** is an email by the insured's agent of 2 April 2004. In that email the Bank under the head ***"subject"*** endorsed ***"House owners claim- Mohammed Alam Khan".*** This also indicates that the insured was notified of the plaintiff's claim and interest in the property".

Bank's Reliance on the Provisions of Mortgage to Avoid Liability

168. The Bank has relied on clause 4 of the mortgage to assert the following:

(a) . The plaintiff breached the contract by allowing the property to be left uninsured for a period of time.

I have made a finding that the property was not left uninsured for any period of time. Even if I hold that the plaintiff did not act or accept the Bank's offer to secure insurance, the property remained insured throughout.

(b). The Bank could settle without the mortgagors consent and if it does, no claim can lie against it.

I find two difficulties with this argument. It appears that the Bank assumed that by being given the permission to settle a claim, it can go past the principles of good faith in bargaining under the cover if an accident occurred and that if it makes a settlement negligently or in bad faith, no action can lie against it. If that provision does mean to exclude the duty of good faith, it is an unconscionable provision in the mortgage and ought to be struck out because no court of equity can lend the Bank such an inequitable interpretation.

169. In my reading of clause 4.3 (b) I find that the Bank is permitted to settle a claim but in good faith without compromising the rights of the Bank and the owner of the property. In fact the plaintiff did allow the Bank to conduct the negotiation. He only refused to accept the outcome because he felt that the Bank had compromised its own and his position.

170. Then comes the clause which binds the plaintiff not to have access to the courts if the bank settles a claim-*the ouster clause*. One cannot contractually bind the other not to have access to the courts. Such a clause is unconscionable unless the legislature specifically limits such rights of citizens from having access to courts.

171. It is a common law right of a party to have unimpeded access to justice. Only the legislature has powers to curtail such rights. It cannot be done so by a contract.

172. Earlier decisions, one of the Privy Council, hold that the parties to the contract of insurance cannot waive interest and ask the court to respect their agreement: ***Anctil v. Manufacturers' Life Ins Co [1899] AC 604 at 609.***

173. Clause 4 of the mortgage document, if it means to grant the bank an absolute right to settle a claim without consultation and be an ouster clause then that clause is in itself contrary to the summary of the cover which grants the plaintiff the right to claim. Since the plaintiff is exercising its rights under the contract of insurance, that becomes the prevailing document to ascertain whether he is the insured with any rights of claim under the policy.

174. Preponderance of evidence concludes that the plaintiff is a party to the insurance contract and has a right to make a claim under the contract.

The Bank as the Trustee

175. For the mortgagee, it is

" clear that a mortgage of goods by assignment would be entitled to insure the whole of the goods in his own name, and to their full value, and, in case of loss, would be entitled to recover in his own name the full amount of the insurance, and would be a trustee for the mortgagor as to any surplus beyond the amount of his own debt"

Ebsworth v. Alliance Marine Insurance Co (1873) LR 8 CP 596, 608 per Bovill CJ.

176. ***"The same is true of the mortgagee of land, but his interest does not extend to revenue from the use or renting of the land, unless he is entitled to such revenue. Prima facie the mortgagee insurers to the extent of his debt, but if allowed by the policy, he may insure the full value of the property".***

Clarke, M. A: "The Law of Insurance Contracts", (Supra), Pg. 120, Para. 4-5G1.

177. The value of the property in 1999 as per the valuation report was $240,000. Mr. Kevin Yuen gave evidence that he has not seen the valuation before. For the Bank to secure a cover exactly in the sum stated to be the value of the property could not be a coincidence. I therefore believe the plaintiff that the Bank asked him for a valuation report and he provided the same to the Bank and the Bank not only secured insurance for its debt but for the full value of the property. The Bank therefore not only acted as a beneficiary but as a trustee for the owner of the property.

The Duty of Good Faith

178. In England, it is ***"an essential condition of the policy of insurance that the underwriters shall be treated with good faith, not merely in reference to the inception of the risk, but in the steps taken to carry out the contract"***.

Boulton v Houlder Bros & Co. [1904] 1 KB 784, 791-792 per Mathew LJ (CA- hull).

179. I have no hesitation in finding that in Fiji, at the least, there must be an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.

180. There is a positive rule of the contract law that conduct of either party which can be said to amount to bringing about the impossibility of performance is itself a breach.

181. The Bank insured the property for the full value and thus as I found above is a trustee for the owner of the property for the surplus amount. As the trustee and the mortgagee of the property bestowed with the rights to make a claim under the policy, the Bank had a duty of good faith to enter into a proper compromise.

182. It is not necessary that the mortgagee waits for the mortgagors consent to settle the claim. It can do one of the following without the mortgagors consent:

(a). accept the claim equivalent to its debt with an unequivocal indication to the insurer that it does not represent the interest of the mortgagor who will have the right to conduct a negotiation separately; or

(b). accept the claim partially, as it deems just and fair and allow the mortgagor to make a separate claim under the cover to obtain what the mortgagor considers just and fair value of the loss. Until such time, the unpaid debt remains but the rights of the mortgagee to exercise its powers under the sale suspended until the mortgagors claim is finalized.

183. The Insurance Company had a duty of good faith too in carrying out the contract of insurance. Since the owner of the property was also a party to the contract, it ought to have consulted the owner in settling any claims and not bind the owner with a compromise entered into by the mortgagee without the consent of the owner of the property.

184. The Bank started off on the correct track. It started consulting the plaintiff but when he refused, it stopped the consultation process and settled the claim without informing the plaintiff.

185. The insurer does recognize that two separate claims can be made, one by the Bank and the other by the owner of the property. It thus should have sought the consent of the owner in settling the claim and not using the settlement as a bar to any further claims by the owner of the property.

186. In this case, the Bank acted on behalf of the owner and gave an indemnity to the Insurance Company. Having known that the owner does not wish to accept the sum of $79,000, it was improper for the Bank to have accepted the money on behalf of the plaintiff.

187. Even if the Bank has given a discharge and the insurer had obtained one, that does not abdicate the plaintiff from suing the Bank for failing to obtain a proper value under the policy to cover the debt and the insurer for failing to give a true value for the loss.

Was the Compromise Proper in Value.

188. The fire occurred on 26 October 2003. At that time, the debt, according to the transaction history was $180,580.09 *(as at 30 October 2003)*. On 4 December 2003 Mclarens Young International wrote to the plaintiff that they were appointed by the plaintiff's insurers to report on the loss by fire. The plaintiff was asked to provide two quotations from the local builders. He did. Those quotations were tendered as ***PEx-5 and 6***. The first quotation was from Swamy's Construction with the quotation given for repair to be $153,000 and the second quotation was by Prem's Construction with the quotation given in the sum of $149,000.

189. On 23 February 2004 the insurers agent McLarens Young International prepared a final report being ***P Ex- 11*** to the insurers. In material parts, the report reads:

"Claim and Adjustment

After discussions with Shivas Singh and comparing the quotes to the replacement cost of the building, we consider that the adjustment should be based on the best price to repair i.e, Prem's Construction Works quotation of $149,000.

The building is approximately 8 years old in the normal cause of events for a total loss we would apply a rate of somewhere around 1.25% per annum for depreciation.

As the building is not a total loss, there is no significant depreciation factor except for some practical adjustment in terms of wear and tear on the paintwork and general interior. Deterioration of the galvanized iron roofing.

On that basis we believe that a reasonable offer of settlement for an indemnity value policy would be the sum of $145,000.00.

Obviously if there is bank interest, the first call on the proceeds claim will be by the bank and we then disperse any claim payment to the insured to allow rebuilding/repairs to go ahead.

Recommendations:

We are therefore recommending an offer of settlement be put forward in the amount of $145,000.00 as above on settlement conditions:-

- ***The banks acceptance and approval.***
- ***Conditional on a signed discharge by third party".***

190. Three distinct matters appear clearly from the report by the Insurers agent. One that they accepted the quotation provided by the plaintiff in the sum of $149,000 less depreciation value resulting to loss in the sum of $145,000, that the plaintiff's consent was needed to settle the claim in that amount, and that the plaintiff had rights over the balance proceeds if any is left after payment of the debt.

191. Even the Bank wrote to the agents on 4 May 2004 and stated that it was not willing to accept the sum of $79,000 but will consider the sum of $149,000 or the assessed sum of damaged (replacement/repair cost): ***P Ex-12***.

192. Both the Bank and the insurer knew that the loss was in the vicinity if $149,000 to $153,000. If the mortgagee wanted to settle at the sum of $79,000, it should not have given a discharge to the insurer completely and allowed the mortgagor to make a separate claim and wait until the claim was finalized. However the mortgagee's action in not allowing the mortgagor to make a separate claim and proceeding to sell the property by way of mortgagee sale was exercise of powers in bad faith.

193. If the mortgagee was to represent the interest of the mortgagor as well in the compromise like what it did then it was incumbent on the mortgagee to obtain the best amount on the loss which would be $149,000. By having accepted the sum of $79,000, the Bank not only compromised its position but the position of the mortgagor as well.

194. I also find that having given the amount of $79,000 and obtained a discharge from only the Bank, the insurer is not liable to be abdicated from the plaintiff. He is also a party to the contract and he did not give the indemnity to the Bank or the Insurance Company. Only the Bank did, so it cannot obtain any more money from the insurers. If the Insurance Company had given the true value of the loss, it would have discharged its obligation under the policy.

195. The other issue that arises is the argument by the plaintiff is that the insurance company should have paid the entire sum of $240,000. The summary of cover states that the basis of settlement would be as follows:

- ***Replacement reinstatement for buildings***
- ***Indemnity conditions for contents***

196. The indemnity condition for contents as the Banks witness said meant no claim can be made. As per the summary of cover, the contents of the house were not insured. If the contents were covered, it would have said under the heading ***"you are covered for".*** The plaintiff says that he ticked an option but that document was in the letter head. I find the option that the plaintiff ticked was ***D Ex - 11*** which contained ***D Ex - 12***. ***D EX - 12*** is the summary of cover which indicates what the plaintiff was covered for and since the summary of cover states indemnity conditions for contents, the plaintiff ought to have

known that he was not covered for the contents. He said that he was assured and representations were made by the Bank that the contents are covered. If these representations were made, the plaintiff, upon receiving the summary of cover would have known that the contents are not covered for. If he did not understand the summary of cover, he could have sought an explanation and if he was not happy that the contents were not covered, he should have negotiated a separate cover for the contents.

197. Another reason why I say that the plaintiff ought to have known that the contents were not covered for was the monetary ceiling of the cover in the sum of $240,000. That infact was the valuation of the building only and if the cover ceiling was $240,000, it indicates that the policy only covered the building and not the contents.

198. Since the contract for the building was replacement/reinstatement of the building, the proper amount that ought to have been disbursed was $149,000 and not $240,000 as claimed by the plaintiff because the plaintiff's contractors had agreed to replace the building in that amount. This is only if the monies were to be paid at the time of the incident.

Material Non-Disclosure

199. The insurer settled the claim at $79,000 and one of the reasons was that the property was partly commercial in nature which the insurance company says was not disclosed to it. The insurance company argues that it had insured the residential property and since the plaintiff was using the property for business, the insurance company was not obligated to pay the monies under policy as there was material no-disclosure.

200. To rescind the contract of insurance or raise the defence of non-disclosure, the onus is on the insurer to prove non-disclosure of material fact which is known to the proposer which would influence the judgment of a prudent insurer and which, if disclosed, would have induced the actual insurer not to make the contract or to make it on different terms. Nonetheless, the plea of non-disclosure will fail in the following cases:

(a). "the information was not disclosed because its disclosure was waived by the insurer;

(b). the information was not disclosed because it was a matter which the insurer could be presumed to know already;

(c). the information was not disclosed because it was a matter in which the insurer was insufficiently interested because it diminished the risk;

(d). the information was disclosed, but the insurer made an error of judgment, perhaps not appreciating the significance of the information, and ignored it: he was not a prudent insurer;

(e). the information was disclosed and was of a type that would put the prudent insurer on inquiry to make further investigations; but the particular insurer made no enquiry".

Clarke, M. A: "The Law of Insurance Contracts", (Supra) page 587, Para 23-1C

201. The Bank negotiated the cover. There is evidence from the Bank's witness that the bank and the insurance agents had visited the property. In that case the Bank and the insurer would have both seen that the business was in operation from the same premises.

202. Further, the Bank would have definitely wanted the valuation of the house to negotiate a proper cover. It would have also had a copy of the lease too. The insurer's agents would also have needed a valuation. I believe the plaintiff that he provided the Bank with a copy of the valuation being ***P Ex-3.*** In the least I find that any prudent banker and insurer would have asked for a valuation and if they did not, they did not do so at their own peril. Upon receiving the valuation, a prudent banker and insurer would have discovered that the property was commercial. It was in operation as a partly commercial and a partly residential premise.

203. By providing a cover for exactly the same amount as stated in the valuation also indicates that the Bank and the insurer had the valuation. How else would they obtain

and provide a cover for exactly the same amount of the valuation. It cannot be such a coincidence. From the valuation, I thus find that the information that the property had commercial activity on it was disclosed to the Bank and the insurer who ignored the information. In any event after visiting the premises, any prudent banker and insurer would have noted the nature of the activity on the premises and utilized the information in the manner they wished.

204. There is no evidence from the Bank and the insurance company that the insurance company would not have insured the property if it knew that the property was commercial in nature. The Bank and the insurance company also did not say in their evidence that it would have otherwise contracted on different terms. These matters should be sufficiently established for the defence of material non-disclosure to survive. The defence in my finding has not been established on the facts and the law.

205. The Bank at all times ought to have known that there was a business on the premise. If it was to arrange a cover, it should have found an insurer which could adequately provide a cover. Neither the bank nor the insurer can blame the plaintiff now.

206. The Bank's bundle of documents had one Tab 23. One of the notation at clause 7 is that ***"CNB arranged insurance cover only provides insurance for houses solely used for residential purposes. If your house is being used for any other purpose other than residential, in the event of a claim, your claim may be denied".***

207. Firstly, the Bank knew that the property was commercial. The insurer also knew this or ought to have known this. They however secured and provided a cover for the full value of the property and charged the premium to the plaintiff. There is lack of prudency with both the Bank and the insurer and so they cannot independently or collectively rely on material non-disclosure to avoid liability.

The Right of Redemption, The CCA and the Mortgagee Sale

208. Under the CCA, the plaintiff has only maintained a claim under s. 80 of the CCA. He has abandoned all other claims under ss. 75, 76, 81 and 83. This was abandoned by the

plaintiff filing further and better particulars on 27 February 2012 ***(See paragraphs C (i), (ii), (iv), and (v).)***

209. I do not find that s. 80 of the CCA was breached in any way. I accept the evidence of the Bank that in 2002, the Bank did give notices under s. 80 of the CCA but the notice was not remedied.

210. I however do find that if the Bank opted to settle without reference to the mortgagor, it should have waited for the mortgagor to make a separate claim and suspended it rights of mortgagee sale until finalization of the claim or accepted a proper value of the loss. After having accepted a proper value of the loss, if the monies were outstanding and the mortgagor was not able to pay up the entire monies outstanding then it could have proceeded to conduct mortgagee sale and apply the proceeds to reduce the debt. The shortfall could have been subject to a claim from the mortgagor personally.

The FTD

211. The action of the Bank and the insurance company started off by recognizing that the plaintiff has a claim in the loss. They kept him informed and also tried to obtain his approval for the payment of $79,000 giving the indication to the plaintiff that he will have a decision to make and that he can make a claim. The Bank and the insurance company both deceived the plaintiff in not consulting him in paying $79,000 and then closing claim on the loss when as the party to the contract the plaintiff had the right to voice out his concerns and/or lodge a separate claim for loss. I find that the conduct of the Bank and the insurance company was misleading and deceptive in dealing with the plaintiff under the contract of insurance. The conduct of the Bank and the insurance company was unconscionable. I find that the Bank and the insurance company breached ss. 54 and 55 of the FTD.

212. An action for contravention of s. 54 of the FTD must be within 3 years: ***s. 126(2) of FTD.*** An action for breach of s. 55 must be brought within 2 years: ***s. 127(3) (a) of the FTD.*** The cause of action began when the Bank and the insurance company settled the claim on 28

February 2005 and closed the policy. From that date the cause of action is brought within the time frame.

213. The plaintiff has to prove that it suffered damages because of this conduct. I will discuss more under the head ***measure of damages*** and find whether any remedy ought to be granted under s. 127(5) of the FTD.

The Measure of Damages:

1. Plaintiff vs. Bank (claim)

2. Bank vs. Plaintiff (counter-claim)

214. The Bank received the money from the insurer on 28 February 2005. The loss occurred on 26 October 2003. Between 26 October 2003 and 28 February 2005, the bank continued to charge bank fee and interest on the account. The amount due on 26 October 2003 was $180,580.09 *(as at 30/10/2003)* and on 28 February 2005 the amount due was $205,192.52 *(as at 27/02/2005)*.

215. Mr. Sen's submission is that the mortgagor was liable to only $180,580.09. I do not find that that is the correct liability of the mortgagor under the mortgage. Although the property was destroyed by fire, the mortgagee is still entitled to charge all necessary charges on the account until it is closed. I thus find that $205,192.52 was the proper sum which was owed under the mortgage debt when the settlement occurred. There was evidence which was not contradicted that from that amount a sum of $10,000 was loan for the vehicle.

216. The home loan thus stood at $195,192.52 or less to be paid by the plaintiff when the settlement occurred under the policy. The reason I say it should be less than $195,192.52 is that interest was also charged for the $10,000 every month. The interest was charged for some 16 months. No evidence was given as to what interest rate applied to the motor vehicle loan but the home loan interest rate was 8.7 %. The transaction history says that the account type was home loan fix and variable. I understand the term fix or variable is in respect of the interest rates. It is only fair that a further sum of $1150 be taken away

from this amount being for the interest on the $10,000 leaving a proper amount to be paid by the plaintiff as at the date of settlement to be $ $194, 042. 52. I have calculated interest on $10000 at a rate of 8.7% for 16 months being from date of fire to date of settlement by insurance company. The interest calculated is an approximate amount.

217. If the bank property settled the claim at $149,000, the plaintiff would have only been left to pay $45,042.52.

218. There is no evidence that the plaintiff was in a position to redeem the debt in that amount of $45,042.52. The Plaintiff was only prepared to pay a sum of $20,000 to the Bank which amount would not have cleared the debt. Even if the Bank did not conduct the mortgagee sale and allowed the plaintiff to negotiate a separate cover, the maximum the plaintiff would have been entitled to would have been another $70,000. Even with that $70,000, he could not have cleared his account under s. 80 CCA notice that was given to him. Under that notice, he had to pay all the monies due to the Bank. The Bank thus had to conduct mortgagee sale and sell the property to the 4th defendant. There is no other evidence that there was another buyer who was ready and willing to buy for more than what the 4th defendant offered. Even the plaintiff himself had no money to pay the Bank except for the $20,000 which he had offered and rightfully not accepted in light of a higher offer.

219. Of course the mortgagee sale reduced the debt by $33,333. However until the mortgagee sale was conducted the Bank was entitled to 8.7 % interest on the sum of $45,042.52 *(giving the plaintiff full benefit under the policy i.e the benefit of $149,000)* from 28 February 2005 until 6 October 2005. The amount comes to:

- ***8.7/100 x $45,042.52 = $3918.70 per annum (i.e $326.56 per month, $10.74 per day)***
- ***28/02/2005 – 6/10/2005 (almost 7 months 8 days)***
- ***Interest for 7 months is $326.56 x 7 months = $2,285.92***
- ***Interest for 8 days is $10.74 = $85.92***

- ***Total Amount due as at 6/10/2005 was $45, 042.52 + $2,285.92 + $85.92 = $47,414.36***

220. The Bank is further entitled to interest from the date of mortgagee sale until the date the debt was written off on the amount of $14,081.36 *(being the mortgagee sale proceeds of $33,333 less the amount due as at 6 October 2005 being $47,414.36)*. The debt was written off on 28 October 2005.

221. The calculation would be:

- ***8.7/100 x $14,081.36 = $1225.08 per annum (i.e $102.09 per month, $3.36 per day)***
- ***6/6/2005 to 28/10/2005 = (4 months 22 days)***
- ***$102.09 x 4 months = $408.36***
- ***$3.36 x 22 days = $73.92***

  Total amount due as at the date of write off is $14,081.92 + $408.36+ $73.92 = $14,564.20.

222. The writing off the loan does not mean that the Bank cannot claim what it wrote off. It only means that the account is closed and the Bank is not subjected to further exposure. When the loan is written off, no further interest and fees are charged on the written off amount as on the evidence there is no statement to show that such interest was charged and levied on the account. The evidence shows that the account was written off and no further charges were made to the account. The Bank can claim the residual debt and the Court can award interest on the residual debt from the date of write off or the date of claim until judgment. Post judgment interest can also be awarded.

223. It goes without saying that if the Bank received the money it could have reinvested and received interest from the same and since it has been deprived of the interest rate from the date of write off, it is only fair that I exercise my discretion in awarding a rate of 6 % from 2006 to 2012 being for 7 years. The interest for 7 years at the rate of 6% on $14,564.20 comes to $6,116.95 calculated as follows:

- ***6/100 x $14, 564.20 = $873.85 x 7 = $6,116.95***
- ***$14, 564.20 + $6,116.95 = $20,681.15***

224. The total amount the plaintiff has to pay back the Bank should is $20,681.15.

225. The Bank is responsible for the $70,000 loss it suffered and that liability should not be laid on the plaintiff because if the Bank had conducted a proper settlement, finally and after the mortgagee sale, the plaintiff would only have had to pay what I have calculated to be $20,681.15.

226. The plaintiff's position with the Bank would have been no better than what I have calculated to be. It is enough penalty for the Bank that it is liable to make good its own loss in the sum of $70,000. Any further damages against it for breach of its duty and under the FTD is not viable and appropriate. The Bank has suffered loss in the sum of $70,000 an amount which it cannot recover for breach of its fiduciary duty in not negotiating a proper claim. I do not think any more damages against the Bank is equitable. If the claim was negotiated properly, the plaintiff would have been in the same position as I have calculated, that is, he would have had to pay the Bank at least the amount I have calculated. The plaintiff would not have had any money in his hands to be able to build the property and run the business so he cannot be compensated for loss of business.

Measure of Damages: Plaintiff vs. Insurer

227. Whether the damages be general or special, the time of assessment is important. When the insurer performs his promise of indemnity, the amount of indemnity is normally calculated on values at the time of loss, even though the insurer may not be obliged to pay until later when the claim has been investigated. The traditional rule of contract law is to assess damages at the time of breach. Recently however, courts mindful of inflation have stressed the basic aim of contract damages to put the plaintiff in as good as if the contract had been performed, and have based damages on values at the date of the hearing.

228. I have made a finding that the insurer cannot escape liability after having settled the claim with the Bank. It is also liable to the plaintiff for the monies it ought to have paid. The insurance company should have at least by 23 February 2004 paid the sum of $149,000 to the Bank. It did not. That was the time when it received a report from its agent. That was the report which recommended a settlement at $145,000.

229. I am of the finding that the damages should be assessed from the date when the monies should have been paid that is by 1 March 2004 because the report was received on 23 February 2004. At least 7 days is needed to process and clear payment.

230. The Insurance Company should have paid a proper amount to the Bank and since it did not and that the Bank has lost the money due to its own actions, the balance sum of $70,000 should be paid to the plaintiff.

231. The insurance company must pay interest from 1 March 2004 until the date of hearing being 26 September 2012. It is a commercial institution and capable of paying interest. It has saved so much money after having not paid the plaintiff. I exercise my discretion to order interest against the 2nd Defendant in the sum of 6 % calculated as follows:

- ***6/100 x 70,000 = $4, 200 per annum (i.e. $350 per month; $11.51 per day)***
- ***1/3/2004 to 1/3/2012 = 8 years =$33,600***

- ***1/3/2012 to 1/09/2012 = 6 months = $2100***
- ***1/09/2012 to 26/09/2012 = 25 days =$ 287.75***

Total = $35,987.75

232. The Insurance company is liable to the plaintiff in the sum of $105,987.75. I do not make any other orders for damages under the FTD as the plaintiff is awarded what it ought to have received in the first place. I must however note that if the monies were paid on time, he would not have received the money but the Bank would have. Today the position is different. The Bank was equally unconscionable in not negotiating a proper value under the policy. The plaintiff had to go through litigation to recover that amount. The monies should thus rightfully go to the plaintiff. Any further payments to the Bank from the in insurance proceeds is not equitable.

Post Judgment Interest

233. I exercise my discretion and do not order any post judgment interest against the plaintiff to the Bank but the insurance company being a commercial institution ought to pay interest as it has kept the plaintiff out of the money for so long. I only order post judgment interest against the insurance company being in the sum of 4 %.

Final Orders

234. In the final analysis, I make the following orders:

(a). The 1st defendant shall have judgment against the plaintiff in the sum of $20,681.15 (inclusive of pre-judgment interest at the rate of 6% for 7 years).

(b). The plaintiff shall have judgment against the 2nd defendant in the sum of $105, 987.75 inclusive of interest at the rate of 6 % from 1 March 2004 until the date of

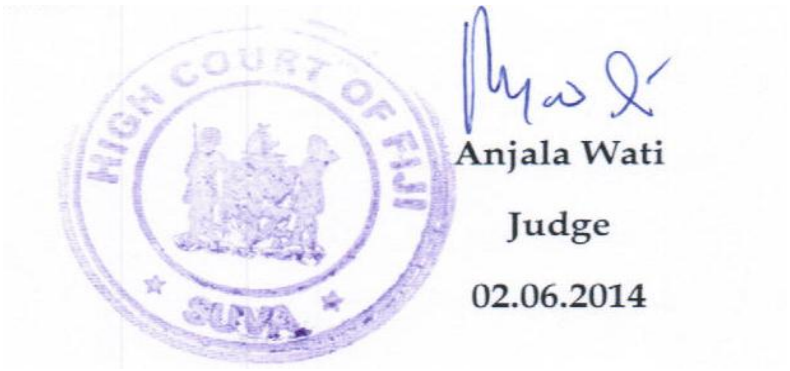
hearing. In addition, the plaintiff is also entitled to post judgment interest at the rate of 4%.

(c). The injunction against mortgagee sale is discharged and the Bank is to proceed to finalize the mortgagee sale.

(d). Since the plaintiff is successful in his claim, I make an order for costs against the 2nd defendant in the sum of $5,000.

(e). The plaintiff is successful in his claim against the Bank although there is judgment against him on the Bank's counter-claim. I thus order that the plaintiff and the Bank each bear their own costs.

(f). Between the plaintiff and the 3rd and 4th defendants, each are to bear their own costs.



To:

1. ***Maqbool & Company for the Plaintiff.***
2. ***Young & Associates for the 1st Defendant.***
3. ***Cromptons for the 2nd Defendant.***
4. ***AG's Chambers Labasa for the 3rd Defendant.***
5. ***4th Defendant in Person.***
6. ***File: Labasa HBC 02 of 2006.***