IN THE HIGH COURT OF FIJI
[WESTERN DIVISION]
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No: HBC 121 of 2013

BETWEEN : **PACIFIC VALLEY RENTALS LIMITED** a duly incorporated company having its registered office at Lot 4, Haji Street, Martintar, Nadi.

PLAINTIFF

A N D : **NEW INDIA ASSURANCE COMPANY LIMITED** a limited Liability company having its registered office and principal place of business at Harifam Centre, Suva.

DEFENDANT

Before : Hon. Mr. Justice R. S. S. Sapuvida

Counsel : Mr. A. Narayan for Plaintiff
Mr. V. Sharma for Defendant

Date of Judgment : 25th November, 2016

JUDGMENT

BACKGROUND

[1] The Plaintiff filed this action against the Defendant insurer on a motor vehicle comprehensive vehicle fleet insurance policy. The claim is based on an accident occurred on 14th November, 2012 at Denarau Road, Nadi. As a result of the accident, the Plaintiff's vehicle registration number FL 614 (hereinafter referred to as "the vehicle") was written off and beyond economic repair. The insured vehicle had a maximum insured sum of $65,000.00 under the Policy Number 3105/10043204/000/00 (hereinafter referred to as "the Policy") (Exhibit P- 2), and the Policy Wordings Jacket (Exhibit P-3).

[2] The Plaintiff accordingly lodged a motor vehicle insurance claim with the Defendant insurer on 19th November, 2012 (Exhibit P- 4)

[3] The Defendant insurer declined the claim by way of its letter dated 24th January, 2013 (Exhibit P-6) stating, inter alia, that the policy did not respond as the driver at the time of accident was unlicensed (and did not hold a valid and current driver's license which was alleged to have been a breach of the conditions of the policy).

[4] The Plaintiff then issued a demand notice to the Defendant insurer through its Solicitors on 6th May, 2013 (Exhibit P-10) demanding, inter alia, that it was entitled to indemnity under the policy as the cause of the accident was as a result of the road conditions and not due to the expired license. As a result of the declinature, the Plaintiff demanded the Defendant insurer that it had suffered and was continuing to suffer, loss and damages.

[5] The Plaintiff instituted the present action on 9th July, 2013 by way of a Writ of Summons and Statement of Claim. The Plaintiff claims indemnity under the relevant policy at the material time of loss.

[6] The vehicle had a pre-accident value of $61,000.00 and was used for the purposes of its business (leasing and rental to locals and tourists). Accordingly the Plaintiff claims loss and damages for the pre-accident value of the insured vehicle, loss of rental and/or profit from 14th November, 2012 until the date of judgment at the rate of $170.00 per diem, compensation under Section 147 of the Commerce Commission Decree, general damages for breach of contract, interest from 14th November, 2012 until satisfaction of the judgment in full and costs on a full Solicitor/Client indemnity basis.

PLEADINGS

[7] By its Statement of Defence filed on 2nd August, 2013, the Defendant insurer contends that the Plaintiff was not entitled to indemnity and that the policy was void and did not offer protection to the Plaintiff as a result of the following main grounds:

- That the subject vehicle was registered with a private license under Section 53 of the Land Transport Act 1998 and not as a Public Service vehicle and/or as a rental vehicle.

- That the Plaintiff made false statements and lodged a fraudulent claim as it had stated that the driver of the vehicle was Jag Deo (when in actual fact it was one Apimeleki Lalanavanua), had failed to state that the driver and others were intoxicated and had fled the scene after the accident, that the driver was not licensed to drive, and that the vehicle was classed as private and not for commercial purposes; and

- That the driver was not licensed to drive a motor vehicle which was therefore a breach of exclusion no. 3 of the policy.

[8] In Reply to the Defence filed on 12th December, 2013, the Plaintiff stated in response to the Defendant, inter alia:

- that the Defendant insurer was aware of and had consented to the use of the Plaintiff's vehicle for rental/leasing purposes and had charged premiums accordingly despite the vehicle being registered as "private" with the Land Transport Authority;

- that it did not make any false and/or fraudulent claim as it provided all material facts known to it at the time of the lodgment of the claim and had relied on the specific direction and advice of the Defendant's agent to insert "Jag Deo" in the claim form;

- that the case of the accident was not as a result of the licensing of the driver, but was instead as a result of the road conditions at the material time;

- that the Defendant insurer by relying on the grounds not previously mentioned in its declinature letter had failed to act in good health.

ADMITTED FACTS

[9] The admitted facts provided in the Minutes of the Pre-Trial Conference held between the parties are as follows:

1. The Plaintiff carries on the business of rental car and leasing.

2. The Defendant carries on the business of general insurance in Fiji.

3. In consideration of premiums paid to it, the Defendant insured the Plaintiff's Vehicle Registration No. FL 614 subject to the terms and conditions.

4. On the 14th of November, 2012 there was a Motor Vehicle accident at Denarau Road, Nadi, Fiji.

5. On or about 19th November, 2012 the Plaintiff lodged a Motor Vehicle Claim for damages/losses as a result of the accident under the Policy stating that the said vehicle was driven by one Jag Deo.

6. By way of its letter dated 29th January, 2013 the Defendant declined the claim.

7. That at the time of the accident, the said vehicle was driven by one Apimeleki Lalanavanua whose driving license had expired on the 3rd of December, 2010.

THE ISSUES

[10] The Issues to be answered provided in the Minutes of the Pre-Trial Conference held between the parties are as follows:

1. Is the Plaintiff entitled to the reliefs as sought in its pleadings?

2. Whether the Defendant was entitled to decline the Motor Vehicle Claim on the basis of its letter dated 29th January 2013 or otherwise as per its pleadings?

[11] However, according to the Exhibit P-6, the date referred to both in the Admission No. 6 and Issue No.2 should be read as "24th January, 2013", but, not "29th January, 2013" as it is stated in the Pre-Trial Conference Minutes in the case record.

THE TRIAL

[12] The following documentary evidence was tendered through the respective witnesses for the Plaintiff's case at the Trial:

1. Motor Vehicle Proposal Form tendered as "Exhibit P-1".

2. Motor Comprehensive Fleet Policy tendered as "Exhibit P-2".

3. Motor Insurance Policy Wordings/Jacket tendered as "Exhibit P-3".

4. Motor Claim Form dated 19th November, 2012 tendered as "Exhibit P- 4".

5. Fiji Police Force Report dated 115th November, 2012, tendered as "Exhibit P-5".

6. Letter of Declinature from New India to PVV Rentals dated 24th January, 2013 tendered as "Exhibit P- 6".

7. PVV and Jag Deo Rental/Lease Agreement for vehicle FL 614 hired out on 13th November, 2012 tendered as "Exhibit P-7".

8. Letter from New India to PVV Rentals dated 20th May, 2013 tendered as "Exhibit P- 8".

9. Letter from New India to PVV Rentals dated 19th July, 2013 tendered as "Exhibit P-9".

10. Demand Notice from AK Lawyers to New India dated 6th May, 2013 tendered as "Exhibit P-10".

11. Receipt for Towing Charge from Western Wreckers Ltd dated 22nd November, 2012 tendered as "Exhibit P-11".

12. Valuation of Vehicle No. FL 614 by Nivis Motors & Machinery dated 24th April, 2013 tendered at "Exhibit P-12".

13. Schedule for Rental Income for Vehicle No. FL 614 tendered as "Exhibit P-13".

14. Bundle of PVV Rental/Lease Agreements for Vehicle No. FL 614 tendered as "Exhibit P-14".

15. LTA Driver's License search for License No. 798382 dated 4th June, 2015 tendered as "Exhibit P-15".

16. Copy of Driver's License No. 798382 tendered as "Exhibit P-16"; and

17. Police Statement (Record of Interview) of Apimeleki Lalavanua dated 19th February, 2013 tendered as "Exhibit P-17".

[13] The Plaintiff called the following witnesses to give oral evidence at Trial:

1. Mr. Shaneel Sudhakar – Director and Shareholder of the Plaintiff [PW-1].

2. Ms. Ditukana Suguturaga – Team Leader for Licensing at Land Transport Authority [PW-2].

3. Mr Apemeleki Lalavanua No. II [PW-3].

[14] The following documentary evidence was tendered by the Defendant at Trial:

1. Police Statement of Jag Deo dated 14th November, 2012 tendered as "Exhibit D-1".

2. Police Statement of Jag Deo (Record of Interview) tendered as "Exhibit D-2".

3. Police Statement of Losana Talei dated 14th November, 2012 tendered as "Exhibit D-3".

4. Police Statement of Harold Nair dated 14th November, 2012 tendered as "Exhibit D-4".

5. Police Statement of Sereima Marama dated 14th November, 2012 tendered as "Exhibit D-5".

6. Police Sketch Plan of Accident Site dated 14th November, 2012 tendered as "Exhibit D-6".

7. Photographs of the scene of the accident tendered as "Exhibit D-7".

[15] The Defendant relied on the oral testimony of the following witnesses who gave evidence at the Trial:

1. Police Constable Eserona Derenalagi – Initial Investigating Officer [DW-1]. and

2. Mr Avinesh Raj – Claims Officer (Legal) for the Defendant Insurer [DW-2].

Plaintiff's Case

Witness – Mr.Shaneel Sudhakar [PW -1]

[16] It was affirmed by PW-1 that he is a Director and Shareholder of the Plaintiff and that he had applied for insurance cover by way of a Motor Vehicle Proposal Form (Exhibit P-1) with the Defendant insurer. PW-1 explained that this was for insurance cover for the fleet of his company vehicles which were used for rental and leasing purposes to locals and tourists. PW-1 further explained that the nature of the rental and leasing was inclusive of short, medium and long term for rental/leasing. On the face of the exhibit P-1 it clearly stated under its paragraph 2 (a) that the vehicle will be used as a commercial purpose and under 2 (b) that it is a lease vehicle. These latter facts are disputed by the Defendant and will be discussed in length later in this judgment.

[17] PW-1 further explained that he had always dealt with the Defendant insurer's Agent who was one Darryl Ravineet Rajcharan (hereinafter referred to as "the Agent"). He proceeded to state that the agent had been explained the nature of his business, how it was operated and what insurance cover he was seeking. The agent had subsequently provided him the second page of Exhibit P-1 which was the calculated premiums for the proposed cover of his fleet of vehicles including the vehicle. PW-1 explained that the insurance premium was calculated at 5% as it was for leasing/rental purpose and that for private purposes the Defendant insurer would normally have charged 3%. PW-1 then confirmed that after lodgment of the proposal, the Defendant insurer approved, accepted and charged him the premiums as aforesaid. PW-1 tendered Exhibit P-2 which was the Motor Comprehensive Fleet Policy issued by the Defendant to the Plaintiff. PW-1 confirmed the contents of Exhibit P-2 including the period of cover, special condition, premiums charged (5%) and page 2 of the Policy which provided full details of the fleet of vehicles which covered under the Policy (including motor

vehicle registration numbers, sum insured and financiers involved). PW-1 also tendered Exhibit P-3 which was the Policy Wordings/Jacket. PW-1 then explained that at about 4am on 14th November, 2012 he received a phone call from the villagers living near the accident site that a rental vehicle was involved in an accident at Denarau Road. He further said that he was due to fly out that morning to New Zealand to visit his father. Accordingly he advised his staff member Alvin Kumar to organize a Towing Truck and report the matter to the Police. PW-1 said that by the time all of this was organized he had boarded the flight to New Zealand at 8.45am. PW-1 also stated that he had later called the Defendant's agent who had advised him to obtain a Police report and lodge a claim. PW-1 then confirmed the details of and tendered as evidence, Exhibit P-4 (the claim Form) including the description of the accident as noted on page 2 of the document. He said in his evidence that the agent had sent the form to him directly via email. PW-1 further said that Alvin Kumar had obtained the Police report and drafted the Claim Form on his behalf. This draft was then sent by Alvin Kumar to him in New Zealand for approval. It is noteworthy to observe that PW-1 stated in his evidence that he was advised by the Defendant's agent to put down Jag Deo as the driver on the Claim Form since he was the hirer and because this was noted in the Police report. PW-1 was then shown a copy of the Police report Exhibit P-5 which was obtained by his staff on 15th November, 2012 and which accompanied the Claim Form dated 19th November, 2012. PW-1 confirmed that the Claim Form was lodged with the Defendant's agent for processing. PW-1 further said that after numerous follow ups he was finally issued a letter of declinature by the Defendant insurer on 24th January, 2013 which was tendered as Exhibit P-6. PW-1 confirmed that the letter of declinature pertained to the insured vehicle and that the Defendant insurer relied on exclusion clause no. 3 of the policy as the driver was unlicensed. He further informed the Court that the Defendant insurer's letter did not specify the name of the driver.

[18] PW-1 produced a copy of the rental/lease document for Jag Deo, the hirer of the insured vehicle. This was tendered as Exhibit P-7. He further said in his evidence that the subject vehicle was hired out for $170.00 a day for 5 days. He confirmed the driver's license details of the hirer as noted therein which was provided to the Defendant insurer at the time of the lodgment of the Claim Form. PW-1 then gave evidence that on 20th May, 2013 (after the Claim was lodged and declinature thereof), the Defendant insurer wrote to him advising that the registration plates of the fleet of motor vehicles had to be converted and recorded with the Land Transport Authority as "LR" (i.e. To convert the private registration plates to rental). This letter was tendered as Exhibit P-8. It is

significant to note PW-1's evidence that this was the first time the Defendant insurer had ever notified the Plaintiff of the requirement that the registration of the vehicles had to be "LR" and that was after the accident was reported to the Defendant. PW-1 also tendered a letter from the Defendant insurer dated 19th July, 2013 as Exhibit P-9. PW-1 said that the Defendant by this letter notified the Plaintiff that the insurance policy had been cancelled. PW-1 then proceeded to convince the Court further that he only became aware of whom the driver was after AK Lawyers (Plaintiff's Solicitors) had been instructed to act for him which was around February, 2013. PW-1 was shown a copy of the driver's license which he confirmed he was given a copy of, through the Plaintiff's Solicitors (which was later tendered as evidence in Court by another witness [PW-3] as Exhibit P-16). PW-1 then produced the demand notice by AK Lawyers which was sent to the Defendant Insurer on 6th May, 2013 which was tendered as Exhibit -10. PW-1 read out and confirmed that the Policy covered him for accidental damage to the insured vehicle (for the sum insured or the market value whichever is less) and towing charges as provided in Exhibit P-3 on the second page. Accordingly PW-1 produced and tendered as evidence the receipt from Western Wreckers as Exhibit P-11 which he again confirmed was for the insured vehicle at the material time and which the Plaintiff had paid. PW-1 also produced and tendered as evidence a valuation of the subject vehicle as Exhibit P-12. PW-1 explained that the valuation was for the pre-accident value which was provided by Nivis Motors who are the official dealers of Mitsubishi vehicles in Fiji. The Plaintiff's vehicle was a Mitsubishi Pajero. PW-1 confirmed the vehicle details as that pertaining to the subject vehicle and valued at $61,000.00. PW-1 pointed out in his evidence that this was a brand new vehicle which was later added to the Plaintiff's fleet of rental/lease vehicles.

[19] PW-1 said that the subject vehicle could easily have had a useful life of 7-10 years for leasing purposes. He further confirmed with paper proof that on average it was for rented/leased out for $170.00 a day although for shorter periods of hire it could yield as high as $300.00 a day [Exhibit P-13]. It was also revealed in his evidence that the subject vehicle had been used only for roughly about 7 months from its first registration before it was involved in the accident. PW-1 also clearly said that at the material time of the accident, the subject vehicle had run off the road at Denarau Road and into a lake. The vehicle was submerged. He further said in his evidence that the vehicle was written off and that it had been inspected by the Defendant's assessors. He also said that he had attempted to mitigate his loss by selling the parts but no one was interested since the engine, gear box and other components were water damaged. He established that there was essentially no salvage value. In support of the Schedule of Hire History for

the subject vehicle, PW-1 produced a bundle of rental/lease agreements with full payment details as Exhibit P- 14. PW-1 confirmed the contents of the bundle of documents as true and accurate. These facts were not rebutted by the defendant.

[20] When the Defendant's defence i.e. that the Plaintiff was fraudulent and that the vehicle was required to be registered as "LR" was suggested and put to PW-1 by the Defendant's Counsel in his cross-examinations, he vehemently denied the allegations. It was revealed from the evidence that the Defendant insurer was always aware from the time of the proposal that the vehicles were registered as private and that it was used for a commercial purpose (rental/leasing). He further explained in his evidence that the Plaintiff was not fraudulent as it relied on the Police report that was obtained to support the Claim Form. The Plaintiff only became aware of who the real driver was much later when the Plaintiff's Solicitors conducted its own investigations and that even after the declinature of the claim. PW-1 in this regard said in his evidence that from the information obtained by AK Lawyers from various sources, he was of the belief that the accident was caused due to the road conditions at the material time. PW-1 stressed the fact that the declinature had a tremendous impact on his business as the subject vehicle was under finance and that the Plaintiff had faced numerous hardships in paying off the Bill of Sale as no income was being generated from the subject vehicle. He also said in his evidence that all pre-bookings for the subject vehicle had to be cancelled. These bookings according to PW-1 were during the festive season between December and January which is a busy period for the Plaintiff. PW-1 confirmed that the subject vehicle was an executive four wheel drive. PW-1 also said in his evidence that throughout the proposal, Policy and Claim stage, the Defendant's Agent was always copied in to all documents, Policies and Correspondences between the Plaintiff and Defendant insurer.

[21] I will discuss what the Defendant's key witness DW-2 said in his evidence regarding the same material facts, later in the judgment after dealing with the other witnesses of the Plaintiff's case.

Witness – Ms. Ditukana Subuturaga [PW-2]

[22] PW-2 in her evidence in chief said that she was the team leader for the licensing team at the Land Transport Authority's Lautoka branch office. She tendered a search of records as Exhibit P-15 which she confirmed was issued by her in regards to Apimeleki Lalavanua No. ii. She confirmed the contents to be true and accurate in that Apimeleki had first obtained his license in 2005 and that during the material time of the accident, his license had been expired. She further

explained to Court that in order to renew an expired license a person is required to fill in an application form and pay a prescribed fee. She advised that no written/physical test is required to obtain a renewal. However, under cross examination, she said that it is illegal to drive a vehicle with an expired license. She was also asked by the Defendant Counsel whether a private vehicle could be used for commercial purpose. She answered in the negative.

[23] In re-examination however PW-2 confirmed that if a private registered vehicle was owned by a business, it could still have a private registered license plate. She was accordingly asked to clarify in that case that a private registered vehicle could be used for commercial purposes to which she answered in the affirmative.

Witness – Mr Apimeleki Lalavanua- No. II - [PW-3]

[24] PW-3 said that he lives in Nasolo, Bua in the island of Vanualevu. He said in his evidence that on 14th November, 2012 he was consuming grog with his friends. He said that he went with two of his friends to White House Nightclub at Martintar, Nadi at about 12am. Whist at the nightclub, he was approached by his friends to drive two drunk Indian men back to Denarau Island. Then he drove the black Mitsubishi Pajero towards Denarau which was about 4-5 kilometers away from the club, he stated. He further said in his evidence that as he approached the bend near a graveyard on Denarau Road, he lost control of the vehicle as it was raining. He said that his attempts to regain control were unsuccessful and the vehicle ultimately tumbled three times and landed in the water. After checking on the rest of the passengers he fled the scene as he was scared since it was his first accident he was ever involved in. PW-3 said he first spoke about the incident the following year in February, 2013 when he was interviewed by the police. He also stated that he was approached by an Indian man who took down his statement. Although he did not know the name of the man who approached him, he said understood that he was from the insurance company and this would have been in the year 2013 but prior to the police interview. PW-3 then tendered a copy of his driver's license as Exhibit P-16 and his police interview (statement) dated 19th February, 2012 as Exhibit P17. He confirmed the contents of both documents as true and accurate. PW-3 went on to say that he first obtained his licence in 2005. He said in his evidence that he obtained the license so he could secure a job as a diver. He commenced work with Matrix Security as a driver from 2006 and had worked in that position with that company for 3 years. He then worked as a delivery truck driver from 2009 to 2010. He also said that he had first obtained his license in a manual

transmission vehicle and that he had ample experience driving an automatic transmission vehicle.

[25] Under cross examination PW-3 admitted that he had about 5 glasses of beer at the Night Club and drank grog (Kava) prior to that for an hour and a half. PW-3 admitted his license was expired at the material time. PW-3 however in his evidence said in respect of the cause of the accident that it was due to the slippery nature of the road as it was raining and therefore wet.

[26] In re-examination PW-3 said that he reduced the speed to 80-90km per hour but that he could not recall seeing any signs or was otherwise unaware of the speed limit in the area.

Defendant's Case

Witness - Eseroma Derenalagi (Police Constable) – [DW-1]

[27] DW-1 was the initial investigating officer of the accident. He said in his evidence that he was transferred from the Nadi Police Station sometime after the accident (sometime in January, 2013). He tendered in evidence a police statement of Jag Deo dated 14th November, 2012 marked as Exhibit D-1. He also confirmed that a record of interview was conducted with Jag Deo on 15th November, 2012 which was tendered as Exhibit D-2. He also tendered police statements of Losana Talei, Harold Nair, Sereima Marama, Police Rough Sketch Plan, and photographs of the scene of the accident as Exhibits D-3, D-4, D-5, D-6 and D-7, respectively.DW-1 said he could not recall the speed limit on Denarau Road but he did recall that the road was wet due to heavy rain. He further said that from the information they had, they thought Jag Deo was the driver. DW-1 was shown the police statement of Jag Deo (Exhibit D-1) and asked when did he recorded the statement. DW-1 confirmed it was taken on the 14th November, 2012. DW-1 was then shown Exhibit P-5 which was the police report dated 15th November, 2012 and he was kept in custody until the following day until he gave his caution interview (Exhibit D-2). Thereafter he was released. DW-1 said that at the time of the police report (Exhibit P-5) they assumed it was Jag Deo who drove the vehicle.

[28] When cross-examined by the Plaintiff's Counsel DW-1 admitted that at the time of issuing the police report (Exhibit P-5) they had not ruled out Jag Deo as the driver as investigations were still pending. He said that this was because the two statements given by Jag Deo were largely inconsistent (Exhibit D-1 and D-2). He

also confirmed under cross examination that there was other inconsistent evidence such as from his colleague Harold Nair (Exhibit D-4) who could not recall anything other than landing the vehicle in the water. Under cross examination DW-1 said that no one was charged for any offence as it appeared to be an unavoidable accident.

[29] DW-1 said he has been a police officer for 9 years. It is significant to note DW-1's evidence that other than the police report dated 15th November, 2012 (Exhibit P-5) there was no other information released to any third party. He confirmed that no statements, sketch plans, or other relevant information was not released to any one until investigations have been concluded. DW-1 said in his evidence that the road surface was smooth and confirmed that it was wet due to rain at the material time. DW-1 was also shown the police sketch plan (Exhibit D-6) and he agreed that there are usually two sketch plans drawn up during an investigation. One is a rough sketch plan (which was Exhibit D-6) and another is a more accurate one with measurements, points of impacts, and tyre markings. He confirmed that Exhibit D-6 was merely a rough sketch plan and did not have the more accurate information noted therein.

[30] Under cross examination DW-1 was also shown the record of the police interview of Apimeleki Lalavanua No. II [PW3] (Exhibit P17). Then DW-1 confirmed that although he had been transferred to Korovou Police Station (and hence left his role as the investigating officer) the said statement was recorded on 19th February 2013. He finally but most importantly said in his evidence that although some statements referred to the passengers and/or driver revealed that they were drunk, no medical report or breathalyzer tests were conducted. He confirmed that no one was charged for any traffic offense on this accident.

Witness – Mr. Avinesh Rai [DW-2]

[31] DW-2 said he is the Claims Officer (Legal) for the Defendant Insurer. He is the key witness in the Defendant's trial. DW-2 when posed with relevant and important matters simply answered that he did not know or that he could not recall. It was significant to note that DW-2 did not bring any of his files, notes or other relevant information despite being the Defendant insurer's key witness as he was the legal claims manager/officer as he described his position. DW-2 said that he is a Legal Claims Officer and has been based at the Defendant's Lautoka branch office for the last 8 years. He confirmed the contents and particulars of the Motor Vehicle Proposal Form, the Motor Comprehensive Fleet Policy and the Policy Jacket (wordings) namely the Exhibits P-1, P-2 and P-3 respectively. DW-2

confirmed that these three documents collectively formed the policy. DW-2 said in his evidence that in order to make a claim, the insured has to lodge an executed claim form and has to attach together with it a police report. DW-2 confirmed that a claim form was lodged by the Plaintiff and a police report was annexed thereto. He further said that once a claim is lodged, a department in their office deals with all the information and engages an investigator if something is not clear. He then said that upon conclusion of their investigations, they found out that it was not Jag Deo who was driving the vehicle but was instead someone else who was unlicensed (he could not recall the driver's name). DW-2 said that he discussed the matter with management and then issued a declinature letter to the Plaintiff. He confirmed the contents of Exhibits P-6, P-8 and P-9 which were letters sent from the Defendant insurer to the Plaintiff dated 24th January, 20th May and 19th July, 2013. He then confirmed that the claim was declined as the driver was unlicensed and that this was not notified to the Defendant insurer by the Plaintiff.

[32] Under cross-examination DW-2 was asked how the Plaintiff could have known who the real driver was when the police had only released information that Jag Deo was the driver, and DW2's only response was that the Plaintiff should have found it out. It was put to DW-2 by the Plaintiff's Counsel that it was wholly unreasonable given that the claim was lodged merely a few days after the incident (on 19th November 2012) and that the only information released by the police force to the Plaintiff was the police report dated 15th November, 2012. DW-2 was also questioned under cross examination what aspect of the claim form was fraudulent and/or false. DW-2 responded that the Plaintiff had stated that Jag Deo was the driver. Upon insistence by the Plaintiff's counsel, he admitted that even the Defendant insurer only found out who the real driver was early in the following year. Hence DW-2 was asked what was fraudulent and/or false at the material time of lodging the claim form. DW-2 was evasive and attempted his best to avoid the question. He was unable to direct the Court to any part of alleging falsity/fraud. It was put to him that the Defendant insurer had acted in bad faith by relying on those grounds to decline the claim when the Plaintiff had provided all material facts know by it. The declinature letter (Exhibit P-6) was also shown to DW-2 and was asked whether that letter actually specified or named the real driver. DW-2 confirmed that it did not name PW-3 as the driver. Exhibit P-4 (Claim Form) was also shown to DW-2 and was asked to explain the contents of the smaller writing on the top of the first page (i.e. *"Answer all questions fully. It will avoid unnecessary correspondence and consequent delay in the settlement of Claim"*). DW2 was then asked whether the Defendant insurer had communicated with the Plaintiff prior to the declinature letter to

clarify any matters which may have been unclear. DW-2's response was that he was not aware. This should have been known by DW-2 because he is the Claims Officer. It was put to DW-2 that no correspondences prior to the declinature letter were ever sent to the Plaintiff to clarify matters. He could not give a proper explanation to that. It is significant to note that in re-examination DW-2 said that the purpose of the aforementioned clause is to enable the Defendant insurer to clarify matters with the insured in any event of an unclear situation.

[33] It was also suggested to DW-2 that the Defendant insurer knew at the proposal stage (i.e. when the Plaintiff first sought insurance cover) that the Plaintiff's vehicles were registered as private and were to be used for leasing/rental/commercial purposes. DW-2 was extremely evasive on the above but did confirm that the insured was issued such a policy providing a covering for such purposes. DW-2 was also asked to point out to Court where in any of the policy documents it was a requirement and/or condition that the vehicle had to be registered as a private vehicle. DW-2 had no answer to this.

[34] DW-2 was shown the Policy Wordings (Exhibit P-3) and asked to confirm the policy wordings on page two under the heading of *"what you are covered for "*. DW-2 confirmed that the insured was covered for accidental damage *"by a person or other than yourself"*. He confirmed that the insured was also entitled to the towing charges. DW-2 was also shown page 3 of Exhibit P-3 and asked to read out and explain the clauses under *"What you are not covered for"* and in particular *"use of vehicle"* which was read out by him. He also confirmed the clauses under the heading *"hiring"* on page 3 of the same document. It was put to him pursuant to the clauses "use of vehicle" and *"hiring"*, the insured was permitted to use his privately registered vehicle for hire, fare or reward provided this was stated in the proposal and policy.

[35] DW-2 was shown the Proposal Form and the Policy (Exhibit P-1 and P-2) and asked to explain what type of cover the Plaintiff had applied for. DW-2 then confirmed that it was a cover which the Plaintiff had applied for. DW-2 confirmed that it was a cover for its vehicle fleet for commercial/leasing purposes. He admitted that the insured requested for such insurance cover and that the insurer accepted the proposal and issued a policy accordingly. In fact DW-2 read out and confirmed the "special condition" noted on the first page in Exhibit P-2 which states that the police was *"for the business of the insured and for commercial use (leasing purpose)"*. It was put to DW-2 that the Defendant insurer was always aware that the insurance was for the Plaintiff's business of rental/leasing and that they had accepted and received premiums for this.

However, DW-2 admitted that the policy noted that there were financiers involved with each of the vehicles in the fleet. DW-2 said that the insurer is usually required to inform the financiers of the insurance cover over the vehicles. He admitted that the Plaintiff would have suffered hardship when the claim was declined given that all the vehicles were under finance and that they were the sole means of deriving an income for the Plaintiff.

[36] DW-2 was shown Exhibit P-7 (PVV Rental/Leasing Agreement) and asked whether this document was ever sighted by him. DW-2 confirmed that he had read it sometime whilst dealing with this claim. DW-2 was also shown Exhibit P-8 and P-9 and was suggested to him that it was wholly unreasonable and a breach of a duty of utmost good faith to have demanded the Plaintiff to obtain rental plates for the vehicles when this was never an issue from the date of the inception of the policy. It was further put to him that it was only after the claim was made by the Plaintiff that the Defendant insurer had taken this stance.

[37] DW-2 was then questioned regarding the actual driver (PW3). DW-2 confirmed that he was only located months after the claim was lodged and sometime the following year. Answering to the Plaintiff's Counsel's cross-examinations, DW-2 confirmed that PW-3 had a license but was expired. When asked whether the Defendant insurer had conducted an investigation to ascertain the cause of the accident, DW-2 answered in the negative. The evidence from both the parties confirms that there had been no proper investigation by the Police and the driver had not been charged for any traffic offence.

Issues in Law and Facts

[38] The issues left with the Court to be decided are in two folds:

1. Is the Plaintiff entitled to the reliefs as sought in its pleadings?

2. Whether the Defendant was entitled to decline the Motor Vehicle Claim on the basis of its letter dated 29th January 2013 or otherwise as per its pleadings?

[39] The determination of part one above can easily be arrived at, once part two is determined. If the Court finds that the declinature of the Plaintiff's claim by the Defendant is valid under the Insurance Policy, then in effect the Plaintiff is not entitled to the relief it is seeking against the Defendant. The determination of the Court on this issue is equally applies on the other way as well.

[40] Therefore, it is pertinent to discuss this legal issue having taken into consideration the terms of the Insurance Policy, the incidental evidence, and the case law authorities relevant to the issue.

[41] Having observed the evidence adduced by both the parties in this trial, it is quite clear that there are a number of issues which were unchallenged in evidence by the Defendant. These can be summarized as follows:

- All evidence pertaining to quantum (i.e. value of the subject vehicle, Plaintiff's loss of income, damages).

- All evidence provided by PW-1 in respect of the representations made to and by Mr. Darell Ravineet Rajcharan (the Defendant's agent), including but not limited to the fact that he was fully aware of the purpose of the policy being requested by the Plaintiff, the nature of its business, the fact that the Plaintiff was advised to state "Jag Deo" as the driver of the vehicle as he was the hirer.

[42] The Plaintiff is claiming for a total sum of $61,080.00 (Sixty One Thousand Eighty Dollars) being the current market value of the said Vehicle. The Plaintiff is further claiming that the Defendant did not act in good faith by refusing its claim on the said vehicle after the accident.

[43] The reason for the Defendant declining cover on the accident was according to the Defendant's defense, because the Plaintiff had made false statement and lodged a fraudulent claim.

[44] Then Defendant made its own findings and determined that the Policy was void and did not cover the Plaintiff due to the following reasons:

(i) The Plaintiff made false statements and failed to inform the Defendant that the Driver of the said Vehicle was in fact Apimeleki Lalanavanua and not Jag Deo. At the time of the accident, the said Driver was intoxicated and fled the scene when the accident occurred.

(ii) The said vehicle was at all material times registered as a private vehicle by the Land Transport Authority (LTA) under Section 53 of the Land Transport Act 1998 and not as a Public Service Vehicle and or as a rental vehicle license.

(iii) The said Driver was at all material times an unlicensed driver under the relevant Laws, By-Laws and regulations.

[45] It is obvious that the onus is on the Defendant to establish the grounds it is relying on to resist the claim so as the Plaintiff to prove the averments in its statement of claim.

[46] Now I will discuss the each of these defences separately since the issues are complexed and mixed with both law and facts.

The First Defence

- *That the Plaintiff made false statements and lodged a fraudulent claim as it had stated that the driver of the vehicle was Jag Deo (when in actual fact it was one Apimeleki Lalanavanua), had failed to state that the driver and others were intoxicated and had fled the scene after the accident, that the driver was not licensed to drive, and that the vehicle was classed as private and not for commercial purposes;*

[47] The evidence led at the Trial and the facts admitted are unambiguous in that theaccident had occurred in the early hours of 14th November, 2012 and that the claim for the damage to the subject vehicle was lodged on 19th November, 2013 by the Plaintiff. The police report of the accident (Exhibit P-5) was issued on 15th November, 2012 which was submitted and annexed to the claim form by the Plaintiff. The police report, inter alia, provides:

> *"The vehicle was hired by one* ***Jag Deo of Auckland, New Zealand****. Driver yet to be located and interviewed for careless driving."*

[48] The Defendant's witness (Insurance Investigating Officer) DW-1 confirmed that other than the police report dated 15th November, 2012 no other information, statements, sketch plans or details were released to any third party. It is significant to note that the investigations were still pending and that the police had not ruled **Jag Deo** out as the driver of the vehicle given his (and other witnesses) inconsistent statements. DW-1 had confirmed that they had only located and interviewed the actual driver (PW-3) on 19th February the following year. (PW-3's police statement – Exhibit P-17)

[49] The Defendant's main witness (DW-2) also confirmed that their Private Investigator did not locate the actual driver until the following year. Hence it is quite clear that at the time of lodging the claim, the Plaintiff had only knowledge of the matters contained in the police report (Exhibit P-5). The Plaintiff provided all the information it was aware of at the date of lodging the claim. It is revealed from the claim form (Exhibit P-4) that it provided all information known by the Plaintiff. The form, inter alia, provided the following details on the first page:

- "Driver Name : **Jag Deo**
- The drivers relation to the policy holder : **Customer**
- Description in full the purpose for which your vehicle was being used: Leased out to client
- "Did police attend? If not, were they informed? Id so which Police Station?: Yes Nadi Police Station"
- "LOSS DESCRIPTION (Accident theft or fire)
- Place or road and town: Denarau Road
- Describe fully how it happened: Refer Police Report. Vehicle had been hired out on 13th November, 2012. We received a call at 4am from villagers in the area saying that the vehicle had overturned at the passengers had fled. The hirers did not get back to us. Instead we found out that they were trying to leave the country."

[50] It must be noted that the Plaintiff's evidence was that PW-1 had spoken to the Defendant's Insurance Agent prior to lodging the claim who had then advised PW-1 to simply put down "Jag Deo's name as the driver of the vehicle. This piece of evidence was unchallenged. The Defendant ought to have called this witness (the Agent) if they intended on disputing this fact. It failed to do so to its own detriment. This fact was pleaded by the Plaintiff in its reply to defence, so the Defendant had prior notice of the claims that the Plaintiff would be relying on.

[51] There is no any evidence to form an opinion in my mind and to find any inkling of false and/or fraudulent claim made by the Plaintiff in relation to the Defendant's allegations under the above ground of defence. The Plaintiff has provided all information known by it. Therefore, I do not accept the fact that the Plaintiff made false statements and lodged a fraudulent claim.

The Second Defence

[52] The next defence is that the vehicle was at all material times registered as a private vehicle by the Land Transport Authority (LTA) under Section 53 of the

Land Transport Act 1998 and not as a Public Service Vehicle and or as a rental vehicle license.

[53] The Defendant in its written submissions advances the following arguments and tries to convince the Court that the Plaintiff is not entitled to the claim.

[54] It says in the written submissions:

- That, the Defendant was of the view that the said vehicle will only be utilized for leasing purposes. The Plaintiff in this particular instance had rented the said vehicle out to one Jag Deo for a few days to gain quick monetary gain from the said vehicle.

- That, In the cross-examination of the LTA Officer, namely Ms. Ditukana Suguturaga, she confirmed that a privately registered vehicle in Fiji cannot be given out for commercial use. She further confirmed that it is illegal to utilize a privately registered vehicle for hiring or leasing purposes in order to gain profit. She finally confirmed that it would be illegal to give out a privately registered vehicle for leasing on certain sums a day.

- That, It is the Defendant's humble submission that the Plaintiff should have altered the registration of the said vehicle prior to leasing or renting it out for monetary gains.

- That, the said vehicle in fact should have been registered pursuant to Section 53 (1)(e) as a "public service vehicle license as provided for in Part VI" of the Land Transport Act 1998.

- That, Under Part VI of the Land Transport Act 1998, Section 63(3) (b) clearly states:
"The classes of public service vehicle license are-

(b)a rental vehicle license, which shall only be issued in respect of a motor vehicle equipped for the conveyance of not more than 8 persons excluding the driver; ....."

- That, Section 65(2) of the Land Transport Act 1998 states as follows:

A person may apply to the Authority for a public service permit of the following types-

b) a rental permit which authorizes the use of a motor vehicle licensed as a rental vehicle, subject to this Act and license and permit conditions, to be driven by a person other than the owner of the motor vehicle or his servant;....."

a. Further, Section 65(4) states that *"A person who operates or permits to be operated a public service vehicle without or contrary to the conditions of a public service permit issued under this section commits an offence and is liable on conviction to the prescribed penalty."*

- That, It is therefore the Plaintiff has contravened the laws prescribed under the Land Transport Act 1998 mentioned hereinabove. The Plaintiff had no authority to give out the said vehicle to one Jag Deo for rental purpose. The said vehicle was registered as a private vehicle and should have been registered as a Public Service Vehicle prior to renting it out.

- That, in contravention of the Land Transport Act 1998, that the action of the Plaintiff has contravened the statutory laws of Fiji. The Plaintiff cannot derive profit from a private registered vehicle nor can he hire it out. The Officer from Land Transport Authority confirmed the same to Court. There is no evidence to the contrary to suggest that any license was granted to the Plaintiff to operate the vehicle in any other manner except for private use.

[55] In reply to the forgoing line of arguments, the Plaintiff says that the unreasonable stance of the Defendant is quite obvious from the submissions of the Defendant when it says: *"whilst it is fair to admit that there was a fleet cover over the Plaintiff's motor vehicles, the Defendant was of the view that the said vehicle will only be utilized for leasing purposes."*

[56] The Plaintiff further points out that the Defendant in its submissions admits the fact that the Plaintiff was covered for the entire fleet even though these vehicles were registered as " private", yet the Defendant then goes on to say that it t was their view that it was only to be used for "leasing purposes". The Defendant is so unreasonable that the Court ought to deem their conduct as "reprehensible" and the Plaintiff ought to be awarded costs on a full solicitor/client indemnity basis.

[57] The Plaintiff further submits that the Defendant itself issued a "special condition" in the policy that the policy was "for the business of the insured and for commercial use (leasing purpose)", and it is clear that the policy was "for the business of the insured" which was clearly a rental car company.

[58] It should be noted the fact that the policy does not have any exclusionary conditions in relation to a vehicle being registered as "private" by the LTA. The Defendant's main witness DW-2 was questioned at length to point out where in the policy was this requirement. He failed to do so.

[59] Addressing the LTA regulations the Plaintiff replies that the LTA regulations clearly provide that the failure to register a vehicle as a "public service vehicle" is merely an offence and liable to conviction to the prescribed penalty. But the Defendant entered into a contract of insurance covering the fleet of vehicles having known the fact that the vehicles including the questioned vehicle in this case are registered in the LTA as "private", yet using for commercial purpose.

[60] I admit as it says by the Counsel for the Plaintiff that the said provision has no relevance whatsoever in terms of the contract of insurance between the Plaintiff and the Defendant.

[61] The evidence of both PW-1 and PW-2 are very relevant to this issue. PW-1 stated that the Defendant was at all times aware that the vehicles had private registration plates. In fact the evidence of DW-2 is also very relevant to this issue. When it was suggested by the Plaintiff's Counsel in cross-examination to DW-2 that the Defendant insurer knew at the proposal stage (i.e. when the Plaintiff first sought insurance cover) that the Plaintiff's vehicles were registered as private and were to be used for leasing/rental/commercial purposes, DW-2 was extremely evasive on the above but did confirm that the insured was issued such a policy providing a covering for such purposes. DW-2 was also asked to point out to Court where in any of the policy documents it was a requirement and/or condition that the vehicle had to be registered as a private vehicle. DW-2 had no answer to this.

[62] The initial proposal for insurance (Exhibit P-1), the schedule thereto (page 2) provides a full list of the vehicles that the Plaintiff required the insurance cover. Even in the second column of the schedule, all vehicles have private registration plate numbers (the subject vehicle being "FL 614).

[63] It is pertinent to note that this proposal was accepted by the Defendant. The Defendant accordingly charged and collected premiums in respect thereto (see Exhibit P-2 and the schedule thereto at page 2). It is equally pertinent to note that the Defendant had included a "special condition" in the policy (at page 1) which stated that the policy was "[f] or the business of the insured and for commercial use (Leasing Purpose)".

[64] The Policy Jacket/Wordings (Exhibit P-3) does not at any part of the document require the vehicles to be registered as rental with the Land Transport Authority. In fact, the Defendant's witness DW-2 could not point out any express provisions requiring as such. The policy in fact plainly allows the Plaintiff to have privately registered vehicles for leasing/rental purposes. The page 3 of Exhibit P-3 under the heading "What you are not covered for (exclusions)" states:

> "1) Use of Vehicle
>
> Is being used for other purpose than stated in the proposal and policy. In case of commercial vehicles, use for private purpose is however allowed"
>
> and later:
>
> "7) Hiring
>
> Is being let for hire, fare or reward or used to carry passengers for hire, fare or reward, unless this use has been stated in your proposal and agreed by the Company."

[65] It is quite noticeable from the gesture of the Defendant's above defense that the Defendant has been wholly unreasonable, misleading and deceptive in its dealings with the Plaintiff by assuring the Plaintiff that it would be covered for loss to its privately registered vehicle fleet (not to mention charging and accepting premiums in respect thereof) and then later relying on this ground to decline the claim. In fact the Defendant at no stage took objection to the Plaintiff's privately registered vehicle fleet at the time of the agreement, during and before this controversial accident. The earliest the Defendant took an issue to this was on 20th May, 2013 (see Exhibit P-8) which was 6 months after the Plaintiff had made the claim under the policy (page 4 of Exhibit P-4 - date of claim is 19th November, 2012).

[66] Therefore, the second defence of the Defendant ought to be dismissed.

The Third Defence

[67] The other defence taken up by the Defendant is that the driver was not licensed to drive which was therefore a breach of Exclusion No.3 of the policy.

[68] The Defendant's Counsel in his written submissions says that it is an agreed fact that the said Driver was at all material times an unlicensed driver pursuant to the relevant Laws in place in Fiji.

[69] I do not agree with this interpretation given by the Counsel to the admission No. 7, since it says as follows:

> "7. *That at the time of the accident, the said vehicle was driven by one Apimeleki Lalanavanua whose driving license had expired on the 3rd of December, 2010."*

[70] Therefore, it is necessary to determine the legal status of "unlicensed driver" by distinguishing between when a person drives a vehicle with an expired driving license and when a person drives a vehicle who has never been granted a driving license.

[71] An unlicensed driver and driving with an expired driving license are two different formulae. One has to pay the renewal fee to the LTA to avoid expiration of the licence to restore the validity of a driving licence once issued. In order to obtain a driving licence for the first time, one has to go through the test/examination/trial/ practical process before obtaining it. Once the licence is issued, then the holder has to renew it at the end of its expiry date. Therefore, driving a vehicle with an expired driver licence and driving without a driver licence are two distinctly different standings.

[72] The PW-2 gave evidence as I have earlier stated. During cross-examination of PW-2 (Ms. Ditukana Suguturaga- LTA Officer), she confirmed that it is illegal for an individual to drive a motor vehicle with an expired license. She further confirmed that a Driver with an expired license is not permitted to drive in Fiji at any time whatsoever.

[73] Therefore, it is pertinent to look at the Insurance Policy (exhibit P-3) to see its exclusionary clauses.

[74] Under the Exclusionary Clauses of the Policy (exhibit P-3), the following are stated:-

> "3). *Unlicensed Drivers*
>
> *Is being driven by a person at the time of accident.*
>
> *(i) Who is not licensed to drive under the relevant Laws, By-Laws and regulations;*
>
> *(ii) Who does not hold a valid and current driving license?*
>
> *If the driver is charged with theft or illegal use of vehicle, this exclusion will not apply."*

[75] It has been pleaded by the Plaintiff under paragraph 6 of the reply to the Defence that the Driver was an authorized driver of the Plaintiff.

[76] This is how it says:

> ***" That the Plaintiff denies Paragraph 6 of the Defence, and states at the time the claim was lodged by the plaintiff with the Defendant it had relied on all material facts known to it at the time and it was subsequent to the time alleged by the Plaintiff (and the filing of the claim) that the Plaintiff became aware of the position. In any event Apimeleki Lalanavanua was an authorized driver and/or nominee and was neither intoxicated nor fled the scene as alleged. The Defendant is put to strict proof of the matters in Paragraph 6."***

[77] It has also been agreed that the said Driver was driving without a valid and current driving license. Finally, it is also agreed that the said Driver was neither charged with theft nor with illegal usage of the vehicle.

[78] It is then a clear inference can to be formulated that the Exclusionary Clause cannot be defeated as the Plaintiff and/or his authorized agents had authorized an unlicensed driver to drive the said Vehicle, which resulted in the accident.

[79] The Plaintiff in its Claim Form (exhibit P-4) under "accident details" in page 2 has stated that the speed limit within the area of the accident on the piece of road

on which the damage has occurred was restricted to 50 km/ph. The speed limit of the piece of Road is not a contested fact.

[80] Then, if the Court has to accept the Plaintiff's line of argument on this issue, according to the evidence of the Plaintiff, what the Plaintiff says is that the Plaintiff authorized Apimeleki Lalanavanua (PW-3) to drive its vehicle on a wet road at 80-90 km/ph. (on a road which the speed limit is restricted to 50) whilst not having a valid driver's license and under the influence of alcohol. PW-3 in his evidence said that he was not even aware of the speed limit of the area of the accident and he cannot recall any speed limit sign but reduced the speed of the vehicle between 80 and 90 km/ph. when he lost the control of it.

[81] Now I will look at the Plaintiff's submissions on this issue. The Counsel for the Plaintiff argues that the Defendant insurer has relied on exclusionary clause no.3 at page 3 of the Policy Wording/Jacket (exhibit P-3), and yet this clause does not assist the Defendant insurer as it would be caught by section 25 of the Insurance Law Reform Act 1996 (ILRA) which provides:

> "Certain exclusions forbidden
>
> 25. Where-
>
> (a) the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and
>
> (b) in the view of the court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because of the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring –
>
> **The insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances."**(Emphasis Added)

[82] He further states that above provision is verbatim (and adopted) from section 11 of the New Zealand Insurance Law Reform Act 1977 which was considered by the New Zealand Court of Appeal in **The New Zealand Insurance Company Ltd v Harris (1990) 6 ANZ Insurance Cases 60-952; [1990] 1 NZLR 10.** Delivering the Judgment of the Court, Justice Richardson referred to the Contracts and Commercial Law Reform Committee report and its conclusion that while insurers were entitled to define the risks in respect of which they would indemnify by excluding circumstances that increased the risk, it was unreasonable for them to avoid liability on the grounds that the risk was increased where the loss resulted from some other cause other that the circumstances relied on as increasing the risk. Justice Richardson explained the effect of section 11 as follows:

> *"In construing a statutory provision of this kind designed for practical application on a day to say basis, refined analysis in terms on metaphysical enquiries into causation should be eschewed. Again, a simplistic 'but for' approach would rob sec. 11 of much of its efficacy and deny its application in examples given by the Contracts and Commercial Law Reform Committee as requiring statutory reform (see para. 29). Rather it is a matter of determining, under a section concerned with exclusion from cover where the limitation has been included because the event or circumstances is likely to increase the risk of loss occurring, whether the loss actually sustained by the insured was caused or contributed to by the relevant event or circumstance. If the existence of the relevant circumstances did not in itself increase the risk of loss, there is no justification either in principle as the Contracts and Commercial Law Reform Committee emphasised, or under the statutory language, for denying the insured the protection of the cover." (Emphasis Added)*

[83] The onus is then on the Plaintiff to establish that both the limbs of section 25 are satisfied and that the issue of causation assists the Plaintiff. Hence the elements that the Plaintiff ought to prove are as follows:

[i] That the clause in the policy was one which was designed to limit or exclude liability of the insurer;

[ii] That the circumstances defining the liability were likely to increase the risk of such loss occurring;

[iii] That on a balance of probabilities the loss did not occur as a result of those 'circumstances'.

[84] The "clause" I have earlier stated in paragraph 74 is the exclusionary clause no.3 at page 3 of the policy (exhibit P-3) which states as follows:

> "3). *Unlicensed Drivers*
>
> *Is being driven by a person at the time of accident*
>
> *(i) who is not licensed to drive under the relevant Laws, By-Laws and regulations.*
>
> *(ii) who does not hold a valid and current driving license."*
>
> *If the driver is charged with theft or illegal use of vehicle, this exclusion will not apply."*

[85] The Plaintiff's Counsel argues that the above clause is clearly designed to limit or exclude liability of the insurer. For the avoidance of any doubt Counsel urges the Court to note that the clause is provided under the heading of *"What you are not covered for (exclusions)"*. Immediately under the heading are the words:

> *"You have no protection under this policy* if, at the time the loss or damage occurs, your vehicle (or any other vehicle this policy states it will cover)...."

[86] Accordingly the Plaintiff submits that the first limb of section 25 is satisfied.

[87] I cannot agree with the above line of argument of the Plaintiff's counsel for the following reasons.

[88] I doubt whether or not the Counsel for the Plaintiff has read the exclusions clause further down from the portion he extracted from exhibit P-3 above. Because, it says in the exclusions in exhibit P-3 as follows:

> "1). *Use of Vehicle*
>
> *Is being used for other purpose than stated in the proposal and policy. In case of commercial vehicles, use for private purpose is*

however allowed.

2). <u>*Alcohol and Drugs*</u>

Being driven by any person who

(i) *at the time of any event giving rise to a claim under this policy has a proportion or breath/alcohol or blood/alcohol concentration which exceeds the legal limit prescribed by LTA Act 1998 or*

(ii) *arising out of the circumstances giving rise to any claim under this policy is convicted of any alcohol or drug related breach of law governing the use of motor vehicles or*

(iii) *following an event giving rise to a claim under this Policy fails or refuses to permit a specimen of blood or breath test to be taken after having been lawfully required give such specimen under the terms of the LTA Act 1998 or any Statutory provision passed in substitution thereof or*

(iv) *is under the influence of intoxicating liquor or drugs.*

3). <u>*Unlicensed Drivers*</u>

Is being driven by a person at the time of accident.

(iii) *Who is not licensed to drive under the relevant Laws, By-Laws and regulations;*

(iv) *Who does not hold a valid and current driving license?*

If the driver is charged with theft or illegal use of vehicle, this exclusion will not apply."

[89] Therefore, it is very clear that the Plaintiff has no protection under this policy since at the time of the loss/ damage the vehicle had been driven by Apimeleki Lalanavanua (PW-3) who did not possess a valid driver's license at the time of accident.

[90] I cannot accept the Plaintiff's argument that the second limb of Section 25 of ILRA is equally satisfied as he says the circumstances defined in the clause is likely to increase the risk of loss occurring. It is very true the line of submissions of the Plaintiff's Counsel that the 'circumstances' we are dealing with here are unlicensed drivers. The only conclusion from this is that an unlicensed driver may not know how to operate a motor vehicle at all and will clearly increase the risk of the loss from occurring. Surely it cannot be held that an unlicensed driver operating a motor vehicle will not increase the risk of loss occurring.

[91] The Plaintiff has entered into a contract of insurance with the Defendant in which there are certain terms and conditions. The parties to the contract shall be bound by the terms agreed upon by them at the time of signing the contract. Any party to the contract cannot later say that a certain term or terms are unreasonable or cannot be used in order to cover up one's own negligence.

[92] However, the onus is on the Plaintiff is to prove both the limbs of Section 25 of ILRA. Because, the Plaintiff shall not be disentitled to be indemnified by the Defendant only when the Plaintiff proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

Issue of Intoxication

[93] The Plaintiff's witness PW-3 who was driving the vehicle at the time of the accident clearly said that he had been drinking Kava for about an hour before he went to Night Club. Then he had gone to Night Club with few of his friends and has started "drinking" with two Indian girls. He said in cross-examinations that what he referred to "drinking" was drinking 5 glasses of unmarked beer within a period of 30 minutes before he was asked to drive the vehicle.

[94] This is absolutely contravened to the terms and conditions of the contract of insurance exhibit P-3. Because, the Plaintiff's argument is that PW-3 is an authorized driver of the Plaintiff (see para 6 of Reply to the defence). The exclusions in exhibit P-3 says:

> "1). *Use of Vehicle*
>
> *Is being used for other purpose than stated in the proposal and policy. In case of commercial vehicles, use for private purpose is how ever allowed.*

2). *Alcohol and Drugs*

Being driven by any person who

(i) at the time of any event giving rise to a claim under this policy has a proportion or breath/alcohol or blood/alcohol concentration which exceeds the legal limit prescribed by LTA Act 1998 or

(ii) arising out of the circumstances giving rise to any claim under this policy is convicted of any alcohol or drug related breach of law governing the use of motor vehicles or

(iii) following an event giving rise to a claim under this Policy fails or refuses to permit a specimen of blood or breath test to be taken after having been lawfully required to give such specimen under the terms of the LTA Act 1998 or any Statutory provision passed in substitution thereof or

(iv) is under the influence of intoxicating liquor or drugs.

3). *Unlicensed Drivers*

Is being driven by a person at the time of accident.

(v) Who is not licensed to drive under the relevant Laws, By-Laws and regulations;

(vi) Who does not hold a valid and current driving license?

If the driver is charged with theft or illegal use of vehicle, this exclusion will not apply."

[95] The PW-3 says he fled the scene soon after the accident. He further says in evidence that he was drunk at the time of accident. He said even in evidence in chief that he fled the scene of accident seconds after the accident to avoid charges. He has given a statement to the police (exhibit P-17) on 19th February 2013 and that was 3 months after the date of the accident. However, PW-3 had not been charged for any offence of drunken driving or for any other charges. PW-3 said in re-examinations that he put down the driving speed to 80/90

km/ph, when he lost the control of the vehicle and then it was tumbled into a pool of water.

[96] It is then as clear as day light that the Plaintiff is caught up under exclusions 2 (iii) and (iv) above since the Plaintiff's authorized driver PW-3 failed to permit a specimen of blood or breath test to be taken after having been lawfully required give such specimen under the terms of the LTA Act 1998 or any Statutory provision passed in substitution thereof and was under the influence of intoxicating liquor.

[97] The Counsel for Plaintiff has submitted that the reliance on the said provision is misconceived as this is not an issue to be determined by this Court. He submits that the Defendant at no stage pleaded that it would be relying on the grounds of intoxication as a defence to the claim and says that this is quite an elementary point of law that a party must specifically plead its case as the maxim goes "he who alleges must prove".

[98] It is true whether the driver of the vehicle was under the influence of alcohol is not an admitted fact but instead an issue to be resolved by this Court given the evidence led at Trial.

[99] The Plaintiff's Counsel however argues this issue in a different way. He says that the Defendant appears to rely on the clause 2 (iii) and (iv) of the exclusions in the policy exhibit P-3 to bring the allegation that the driver was driving under the influence of alcohol and that the Defendant had never pleaded the issue of intoxication.

[100] However, the Defendant in paragraphs 6 and 9 of its Statement of Defence dated 2nd August 2013 clearly pleaded as follows:

> "6. That the Plaintiff lodged the insurance claim with the Defendant dated 19th November, 2012 stating that the driver of the subject vehicle at all material times was one Jag Deo, a statement which was false in material particular in that the subject vehicle was driven at all material times by one Apimeleki Lalanavanua and also failed to state that the driver and others were intoxicated and fled the scene after the accident.
>
> 9. That further the Plaintiff's claim dated 19th November, 2012 also was also false and or fraudulent in that the Plaintiff failed to

state.....and also failed to disclose that the driver was intoxicated at the material time....as the wording of the Policy was clear and unequivocal in that if any claim under the Policy was false or fraudulent then the insurance shall be void and no benefits were payable."

[101] Hence, the date of the defence is very important. Because, the driver who was driving the vehicle at the time of accident (PW-3) had made the statement exhibit P-17 to the Police on 19th February 2013. Until such time the driver PW-3 had been absconding having fled the scene of the accident since 14th November 2012. Then it was only when the driver PW-3 made the statement to the police that the Defendant discovered the fact that the driver was driving under the influence of intoxicating liquor at the material time.

[102] The Counsel for Plaintiff in countering the Defendant's defence of intoxication and brings the argument that the Court of Appeal in **Ashok Kumar v Sun Insurance Company Ltd [2005] FJCA 63; ABU 0072 of 2004S (11 November 2005)** has considered the effect of policy wordings and exclusions in relation to a third party policy issued by the insurer in that case which excluded cover if the driver was "under the influence of intoxicating liquor".

[103] The Counsel points out that the Court of Appeal cited and relied on **London v British Merchants Insurance Co. Ltd (1961) 1 WLR 798** to define the terms "under the influence of intoxicating liquor" as being under such influence as to disturb the quiet, calm and intelligent exercise of faculties".

[104] The Court of Appeal considered the evidence relied on by the insurer in that case to prove that the driver was driving "under the influence of intoxicating liquor" which included an **admission** by the driver:

> ".....it was somewhat equivocal and it did not establish the extent of the beer consumed by the driver, or **the degree of the effect that it had upon him. To consume liquor is not enough to invoke the exclusion.** It was **necessary for the insurer to show that the driver was "under the influence of intoxicating liquor," within the meaning given to that expression,** when driving the vehicle at the time of the event giving rise to liability on the part of the owner or driver. The evidence in this case fell short of that required, in the light particularly of the time over which the beer was drunk, the time which elapsed between 10pm and 1.30am, the

lack of evidence of the amount consumed by Kurisou, and the somewhat equivocal nature of the admission."

[105] The Plaintiff's Counsel also submits that the High Court of Fiji in **Sun Insurance Company Limited v Yongshan Store Company Ltd [2016] FJHC 388; HBC 198.2013 (10 May 2016)** dealt with a similar issue where the insurer in that case was seeking various declarations. The insurer sought an order, inter alia, that the insurer was entitled to avoid liability and indemnity under the policy on the grounds that the driver of the vehicle was under the influence of intoxicating liquor (which is a condition verbatim to the wordings of the condition in the present matter).

[106] It is noticeable that the High Court in **Yongshan** (supra) adopted and relied on *London v British Merchants Insurance Co Ltd,* much like the Fiji Court of Appeal did in **Ashok Kumar** (supra) in respect to the interpretation of the words "under the influence of intoxicating liquor". The High Court in **Yongshan** (supra) also relied on the "Mair" test and held that despite the admissions made by the driver that he had been consuming alcohol at the material time leading up to the accident, this was not sufficient to rely on the said provision to decline liability/indemnity under the policy. The Court held as follows:

> "The cases cited show the judges relied on ***medical*** and admitted evidence to find the respective drivers had satisfied the test in "Mair". Here the Plaintiff's Counsel stated they had ***no medical evidence*** to bolster their stand. No explanation was given to why no such evidence was forthcoming.
>
> Surely the ***expert evidence of a doctor or some other medical staff*** at the CWM Hospital would have been the cogent evidence required for me to reach a decision.
>
> Instead, the only evidence that the Plaintiff has provided is via its witnesses. *But none of them are medically qualified nor are they experts to confirm that the 2nd Defendant had the necessary amount of blood alcohol to be considered as intoxicated.*

[107] Yes, it is true that onus is on the Defendant to show that the driver was *"under such influence as to disturb the quiet, calm and intelligent exercise of faculties"*. The cases relied on by the Plaintiff shows that there is "no substitute for expert

evidence". But, the driver PW-3 was listed by the Plaintiff and called his evidence. The Defendant cross-examined the witness PW-3.

[108] PW-3 had never been under the control of the Defendant, but is an instantly picked authorized driver of the Plaintiff who had been under the Plaintiff's control according to the evidence and as submitted by the Counsel for Plaintiff. It is then the duty of the Plaintiff to bring the driver who is responsible for causing the accident to the Police and make him available for the required formalities such as permitting a specimen of blood or breath test to be taken after having been lawfully required to give such specimen under the terms of the LTA Act 1998 or any Statutory provision passed in substitution thereof. But, PW-3 himself had willfully prevented the legally required formalities to be carried out since he fled the scene of the accident and absconded for few months. Then how can the Court expect the Defendant to call expert medical evidence to prove the contrary.

[109] Therefore, the Plaintiff cannot now say that the Defendant has failed to establish the fact that the driver PW-3 was operating the vehicle whilst under the influence of intoxicating liquor. PW-3 himself said in evidence that he refused the request of Jag Deo to drive the vehicle because he was not in a position to drive a vehicle since he had been drinking Kava and Beer.

[110] There is evidence from the Plaintiff that the driver had consumed Kava for one and half hours prior to his consumption of 5 glasses of beer at the Night Club. Even though there is no expert evidence to establish that this had an effect on the driver's ability to drive, in fact, I note from the record of evidence that the driver Pw-3 had initially refused to drive the vehicle when Jag Deo asked him to drive due to his drunkenness and reluctantly agreed to operate the vehicle even under the influence of liquor.

[111] However, PW-3 in evidence said that the accident occurred as a result of the slippery road conditions. I do not believe this witness's evidence regarding the cause of the accident. Because, there is evidence that it had been raining by the time the vehicle started its journey from the Night Club towards Denarau. The road was wet. PW-3 reduced the speed of the vehicle to 90 or 80 km/ph, only when he lost the control of the vehicle. The national maximum speed limit at any given area in Fiji is 80 km/ph. It was revealed in evidence that PW-3 the unlicensed driver having even reduced the speed of the vehicle had not been able to control the vehicle which clearly establishes that he had been driving the vehicle senselessly at a very excessive speed due to the intoxication. He was an unlicensed driver as well.

[112] The Plaintiff's Counsel argues that Defendant's only other witness (the claims officer) admitted that they did not investigate the cause of the accident. How could the Defendant Insurance Company investigate into a road accident when the duty of the investigation into road accidents is with the Fiji Police? The duty and the power to investigate into the other matters such as intoxication/ blood tests/ breath tests to ascertain as to the cause and/or the factors contributed to the accident, and to prosecute the offending drivers are also vested with the Police. It was the Plaintiff's driver who did not allow the opportunity for the authorities concerned to carry out a proper investigation into the intoxication condition of the driver at the time of, or soon after the accident.

[113] In the case of **Tappoo Holdings Ltd** v **Stuchbery [2006] FJSC 1; CBV0003u.2005s (15 February 2006)**, the Supreme Court upholding the decision of the Court of Appeal in **Stuchbery v Tappoos Holdings Ltd [2005] FJCA 12; ABU0034.2004s (18 March 2005)** was of the view that it was the onus of the insurers to prove that the loss or damage was caused directly or indirectly by or resulted from the event and this was discharged by the insurers both as a matter of common sense and from cases. Moreover, the insurers' liability was defined under the policy because the insurers considered that an "insurrection" was likely to increase the risk of loss. On the other hand, the petitioner (insured) has the onus to prove that there was no causation and no contribution, which they failed to do so.

[114] In illustrating the probable application of Section 25 of the ILRA, the Supreme Court in **Tappoo Holdings Ltd v Stuchbery (supra)** stated the following:

> *[59]* A simple example will illustrate the mischief to which the sections were directed, and their operation. A typical motor vehicle damage policy provides that the insured is not entitled to indemnity if the car was being driven by a person under the influence of intoxicating liquor when the loss or damage occurred. The insured will almost certainly not be entitled to recover under the policy, despite the section, if the loss or damage occurred while the vehicle was in motion because he would not be able to prove, in terms of s.25 (b) that the loss, "**was not caused or contributed to** by" the driver's intoxicated condition. If, however, the vehicle was stationary in a line of traffic or at traffic lights, and was struck from behind, the insured will be able to prove that the loss was **not** caused or contributed to by the driver's intoxicated condition, and the section will override the exclusion clause in the Policy.

[115] In the case at hand, the Policy between the Plaintiff and the Defendant had exclusionary clauses in particular:

" 2) *Alcohol and Drugs*

Being driven by any person who

(vii) at the time of any event giving rise to a claim under this policy has a proportion or breath/alcohol or blood/alcohol concentration which exceeds the legal limit prescribed by LTA Act 1998 or

(viii) arising out of the circumstances giving rise to any claim under this policy is convicted of any alcohol or drug related breach of law governing the use of motor vehicles or

*(ix) **following an event giving rise to a claim under this Policy fails or refuses to permit a specimen of blood or breath test to be taken after having been lawfully required to give such specimen under the terms of the LTA Act 1998 or any Statutory provision passed in substitution thereof or***

*(x) **is under the influence of intoxicating liquor or drugs.***

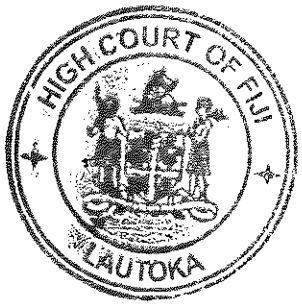
[116] The said Driver PW-3 during the evidence in chief and whilst being cross-examined had admitted to being intoxicated whilst driving the said Vehicle. In applying the Supreme Court illustration of Section 25 of the ILRA to the case at hand, irrespective of whether the onus is on the Defendant Insurer to prove the contrary, when the evidence of the Plaintiff itself established the fact that the accident occurred while the vehicle was moving and driven by PW-3 having authorized by the Plaintiff and who was under the influence of intoxication of liquor when the accident, loss or damage occurred with no valid driver's licence, I am of the firm view that there need no further proof to determine that the accident was triggered due to the former facts and that it is contravene to the insurance policy exhibit P-3, and thereby the Plaintiff cannot be entitled to indemnity. The only witness the Defendant could have called is PW-3 even if the Defendant is required to call evidence in this regard since the Plaintiff's authorized driver PW-3 himself fled the scene of the accident and did not make him available for the authorities to conduct the investigation to ascertain the former.

[117] Therefore, on the forgoing reasons I decide that the Defendant had the absolute right to decline the Motor Vehicle Claim lodged by the Plaintiff based on the reasons mentioned in exhibit P-6 and as pleaded in its pleadings.

[118] I will now answer the two issues raised at the trial as follows:

1. No
2. Yes

[119] Hence, I strike out and dismiss the Plaintiff's writ of summons and the statement of claim with costs to be assessed unless agreed upon by the parties.



R. S. S. Sapuvida

[JUDGE]
High Court of Fiji.

On the 25th day of November, 2016
At Lautoka

Solicitors
- A K Lawyers for the Plaintiff
- Vijay Naidu Associates for the Defendant