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

CIVIL ACTION NO. HBC 102 OF 2016

BETWEEN : **NAREND PRASAD** of Drasa, Lautoka, Farmer.

PLAINTIFF

A N D : **DOMINION INSURANCE LIMITED** a limited liability company having its registered office at 231 Waimanu Road, Suva.

DEFENDANT

Appearances : Ms S. Ravai for the plaintiff

Mr D. Prasad for the defendant

Date of Trial : 03 & 04 December 2018

Date of Judgment : 22 May 2019

JUDGMENT

Introduction

[01] The plaintiff brings this action against the defendant claiming indemnification of $180,000.00 being lost of a cane harvester, which was destroyed by fire. His claim arises out of an insurance policy he had with the defendant. The defendant refused to indemnify the loss on the grounds that: (1) there was no valid policy at the time of the incident and (2) there was material non-disclosure on the part of the plaintiff.

The background

[02] The brief background facts are that: the plaintiff, Narend Prasad was the registered owner of an Austoft Cane Harvester Machine registration No. FG 658 (*'the subject property'*). On 26 June 2014, he obtained a fire cover policy No.

299175-1 over the subject property in the sum of $180,000.00 (*'the policy'*). The policy was for a period of one year, commenced 26 June 2014 and expired on 26 June 2015. According to the plaintiff, during the currency of the policy the subject property was damaged beyond repair by fire. He notified the incident to the defendant, Dominion Insurance Limited and lodged a claim for indemnity. The defendant refused to indemnify. The plaintiff brings this action against the defendant for loss and damages suffered as a result of the defendant's default.

The defendant's case

[03] The defendant in its statement of defence states that:

1. *The insurance policy was subject to 4 premium instalment payments which were 26 June 2014, 26 July 2014, 26 August 2014 and final payment on 26 September 2014. Out of the above payments the plaintiff was in arrears for August payment and final payment of $1,380.00 was to be paid in September 2014 which was also not paid. As per the policy and payment terms the plaintiff had no valid insurance cover as at 26 September 2014.*

2. *The plaintiff in the proposal form made a declaration that the subject property be insured for $180,000.00.*

3. *The proposal form also had a clause whether any insurance policy for the subject property was cancelled or refused and he failed to declare that Sun Insurance Co Ltd and New India Assurance Ltd had prior insurance policies and they refused to renew the same after its expiry.*

4. *The subject property was destroyed by fire on or about 11 October 2014. The plaintiff made a claim for damage to the subject property to the defendant and as a requirement he had to fill in the claim form seeking damages.*

5. *The defendant also obtained the insurance cover for the subject property by giving false information by way of declaration. Thus breached the policy from the date of inception of the said policy and was in breach until the subject property was destroyed by fire.*

6. *The Loss Adjuster in its investigation found that the subject property was beyond economical repair and recommended it to be written off. The*

investigator as part of his investigation was informed by the plaintiff that the subject property engine was removed and refitted 2 to 3 times as it was giving problems.

[04] Essentially, the defendant declined to indemnify for two reasons. First, there was no valid policy as a result of non- payment of premium. Second, there was material non- disclosure.

Agreed facts

[05] At the Pre-trial conference ('*PTC*') the following facts were agreed between the parties:

1. *That the plaintiff was at all material times the registered owner of an Austoft Cane Harvester Machine registration No. FG658.*

2. *That the defendant is in the business of providing insurance cover for motor vehicle.*

The issue

[06] The trial proceeded with the following two primary issues:

(i) Whether there was a valid insurance policy at the time of the fire to the cane harvester.

(ii) Was there material disclosure to obtain the insurance policy?

The evidence

Plaintiff

[07] The plaintiff called only one witness namely Narend Prasad, the plaintiff himself ('*PW1*') and tendered 9 documents marked as '*PE1*' to '*PE9*'.

Defendant

[08] The defendant called 6 witnesses namely Nawendra Prasad ('*DW1*'), Ashwin Vikash ('*DW2*'), Dhupendra Sharma ('*DW3*'), Vijay Kumar ('*DW4*'), Vikash Kumar ('*DW5*') and Manish Kumar ('*DW6*') and tendered 11 documents marked as '*DE1*' to *DE11*'.

[09] I will state what each of the witnesses said in their evidence where necessary.

Validity of Insurance Policy

[10] The first issue is whether there was a valid insurance policy at the time of the fire to the harvester, the subject matter.

[11] The defendant issued a fire policy over the subject matter for the sum limited to $180,000.00, subject to payment of premium in instalments ('*PE2*', the policy). Under conditions, clause 6 of the policy states:

> '**6** *Unless alternative premium payment terms have been agreed in writing this policy will become null and void 14 days after the original inception date or any subsequent renewal date unless the full annual premium has been paid to Dominion.' (Emphasis added)*

[12] The sum insured was $180,000.00 and the premium of $6,480.00, inclusive of vat and stamp duty, had to be paid by instalment payment. The instalment payment schedule was as follows (see Invoice dated 26 June 2014, '*PE5*'):

Payment terms:	*As per policy conditions*

Instalment Payment Schedule

Due Date	*Amount*
26/6/14	*$2,430.00*
26/7/14	*$1,350.00*
26/8/14	*$1,350.00*
26/9/14	*$1,350.00*

[13] The period covered by the policy was from 26 June 2014 to 26 June 2015.

[14] On 11 October 2014, the subject property was destroyed by fire beyond economical repair.

[15] The plaintiff duly lodged his claim with the defendant. The defendant denied liability and declined in full the claim. The defendant's decision to decline the claim was based on their investigation and findings. By a letter dated 9 March

2015, the defendant informed the plaintiff the reasons why his claim was declined, which includes among other things (*'PE7'*):

> *"...*
>
> - *Your policy was subject to three premium installments scheduled for payment on 26th June, 26th July, 26th August & a final installment on 26th September 2014 respectively.*
> - *Final installment of $1,380 was unpaid out of which $30.00 was balance for August and the rest being September 2014 account.*
> - *At the time of the loss, your policy had lapsed due to non-payment of premium.*
>
> *..."*

[16] It is usual for the policy to contain express provisions dealing with lapse for non-payment. The policy issued to the plaintiff has express provision that: ... *this policy will become null and void ... unless the full annual premium has been paid to Dominion.*

[17] The plaintiff admitted in his evidence that he did not pay the instalment premium for the month of September which was due on 26 September 2014 and that he tried to make that payment after the incident of the fire to the subject matter, but they refused to accept. It has been admitted by the plaintiff in the statement given to Professional Investment Agency (PIA) (*'DE01'*). DW 4 confirmed that the plaintiff tried to pay the last premium after the fire but he could not receive it as the policy had lapsed in September 2014. DW4 also said that he called the plaintiff many times to remind him of the last premium payment but after a few calls the plaintiff began to avoid his calls and only after the fire the plaintiff wanted to pay.

[18] Initially, the plaintiff in his evidence in chief said that he did not know when the instalment premiums were due but in cross examination he admitted telling the investigator (*D1 pg 85, question 65*) that he still owed $1,380.00 premium to Dominion.

[19] The plaintiff said that he never received the policy and that he was never aware of one payment of the premium was overdue. This is not correct. The plaintiff was making payment of instalment premiums until the last payment, which was due on 26 September 2014. He could not have made such payment without having the policy with him. DW 4 in his evidence said that after the fire the

plaintiff requested another copy of the insurance policy as he had lost his copy which was then given to him at the Ba Motor Parts together with the claim form.

[20] Ms Ravai of counsel for the plaintiff contends that: the defendant cannot rely on the breach of the condition (condition 6) and deny liability for any indemnity claim of the plaintiff regarding his Cane Harvester. The defendant has clearly waived its right to enforce condition 6 or is estopped from enforcing its right as per the condition when it failed to notify the plaintiff in writing of the cancellation of his policy, thus the same is to be inferred to be still valid especially at the time of the fire. In support of her argument, she draws the Court's attention to the plaintiff's document ('*PE9*').

[21] The document ('*PE9*') is a letter dated 3 March 2016 written to the plaintiff by the defendant's Credit Control Officer, Mr Manish Kumar ('*DW6*'). By that letter, the defendant notifies the plaintiff that his policy will be cancelled in 14 days if he fails to make his outstanding premium balance of $1,380.00.

[22] DW4 told the court that he reminded the plaintiff over the phone about the overdue premium, and he confirmed that there was no written notice concerning the payment of premium. DW 6 explained why he sent the letter ('*PE9*') to the plaintiff. He said that he would give notice for the lapse of the policy and cancel it just for the solvency issues as we have to prove the RBF that we are solvent enough like if a policy is aged it affects our solvency. According to him, it is an RBF procedure that a notice need to be issued. Under cross examination he said that it was popping up in the debtors which means the policy was null and void, however he owed me a promise to pay for which the letter was issued.

[23] Where the insured fails to pay the premiums, whether voluntarily or involuntarily, the policy is liable to lapse. This is because of the general common law rule that substantial failure to perform the obligations under a contract may give the other party the right to terminate that contract.

[24] It was held in *Kumar v Dominion Insurance Ltd* [2000] FJLawRp 53; [2000]1 FLR 223 (6 October 2000) that:

> *(1) There was no ambiguity as to payment payable. The obligation to pay premium before expiry of policy and the continuation of cover were inextricably linked, thus*

the insurance company was entitled to cancel after expiry of notice and failure of plaintiff to pay full payment of premium.

(2) The effect of the renewal certificate was that it did not become valid until the premium was fully paid. The liability of the insurer to indemnify for the term of the policy was conditional upon the premium having been paid unless the defendant by words or conduct had waived that term.

[25] On the issue of validity of an insurance policy on the basis of non-payment of premium, the Fiji Court of Appeal in *Dominion Insurance Ltd v Sea Island Paper & Stationery Ltd* [1998] FJCA 17; Abu0008u.97s (15 May 1998), a case cited by the plaintiff, said:

'In an insurance policy the insurer may require that payment of premium for which it undertakes to indemnify the insured must be paid before liability arises.

*However, the law is clear that notwithstanding such a requirement the insurer may extend time for payment of the premium and the validity of the insurance policy is not affected by the non-payment at the time of the risk. In MacGillvray and Partington "**On Insurance Law** (7th edition) at paragraph 861 it is stated:*

"There is no rule of law to the effect that there cannot be a completed contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that, if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment....."

In Vol. 25 of ***Halsbury's Laws of England*** *(4th Edition) at paragraph 464 entitled* ***Prepayment of Premium*** *it states:*

"In practice, payment of the premium in advance is usually a condition precedent to liability, not only in the case of the first premium but also of the renewal premium. The assured is then precluded from recovering for a loss which happens before the premium is paid unless the circumstances are such that the insurers are estopped from denying that they have received payment or have by their conduct waived the condition."

A similar statement of the law can also be found in the judgement of Viscount Maugham in ***Wooding v Monmouthshire and South Wales Mutual Indemnity Society Ltd*** *[1939] 4 All ER 570 at 581.*

To determine whether the appellant was entitled to decline to indemnify the respondent because the premium was not paid when the fire occurred, it is necessary to examine the sequence of events in more detail.'

[26] In the matter at hand, the policy contains an express condition that the policy will become null and void unless the full annual premium has been paid to Dominion. The plaintiff is not entitled to deny the existence of such a condition because he was making payments of premium by instalments, but defaulted in the last payment. He knew that he was in default of the last payment. That is why he was trying to make that payment after the fire occurred. The policy was liable to lapse if the premium were not paid in full. In the circumstances, the defendant was entitled to invoke the clause 6 condition and had the right to terminate the policy and deny the indemnification. I would, accordingly, hold that there was no valid policy at the time of the fire to the subject property.

Material non-disclosure

[27] Another central issue was whether there was material non-disclosure on the part of the plaintiff when he obtained the policy.

[28] The defendant alleges that the plaintiff obtained the insurance cover for the subject property by giving false information by way of declaration in that he has supressed the facts that Sun Insurance Co Ltd (SICL) and New India Assurance Ltd (NIAL) had prior insurance policies and they refused to renew the same after its expiry and that the subject property had two fires previously.

[29] In *Dawson Ltd v Bonnin* [1922] 2 AC, 413, the House of Lords held:

'(affirming that judgment diss. Viscount Finlay and Lord Wrenbury) that the policy was void, but, varying the judgment, that the fact that the proposal was made the basis of the contract made the answers thereto fundamental, and that an

untrue answer made the policy void whether it was material from the ordinary business standpoint or not.'

[30] It is alleged the plaintiff had suppressed the fact that SICL and NIAL declined to renew the policies over the subject property previously. In the proposal form ('*DE1*') in answer to question *"HAVE YOU OR ANY DIRECTOR, OWNER OR PARTNER EVER (a) Had insurance cancelled or refused" the proposer's (plaintiff's) answered "No."* In evidence the plaintiff said that the proposal form was filled in by the defendant's agent Vijay ('*DW4*') and he (the plaintiff) told him that he had insurance with Sun and New India and they decline to renew it. DW4 denied it. He said the plaintiff did not say anything about the previous insurance.

[31] Tuilevuka J in *Dominion Autoparts and Acessories Ltd v New India Assurance Co Ltd* [2018] FJHC 1025; HBC211.1988 (26 October 2018), of the burden of proving breach of the duty to disclose material facts, said [at para 19]:

'The burden of proving breach of the duty to disclose material facts falls on the insurer who alleges breach. There are three things which an insurer must prove to discharge this burden. First, he must prove as a matter of fact that a previous insurer had declined to renew a policy or refused indemnification for the insured. Second, that the insured had failed to disclose this fact and thirdly, that the said fact is a material fact.'

[32] Ms Ravai on behalf of the plaintiff submits that in evidence, the plaintiff clearly told the court that it was not him that filled out the proposal form but rather the defendant's agent (Vijay) that the plaintiff cannot be held liable for material non-disclosure. To fortify this submission she relies on sections 13 (2) and 14 (1) of the Insurance Law Reform Act 1996 ('*the Act*').

[33] Section 13 of the Act states:

"Duty of disclosure

***13** (1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that-*

(a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or

(b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.

(2) The duty of disclosure does not require the disclosure of a matter-

(a) that diminishes the risk;

(b) that is of common knowledge;

(c) that the insurer knows or in the ordinary course of his or her business as an insurer ought to know; or

(d) as to which compliance with the duty of disclosure is waived by the insurer.

(3) Where a person-

(a) failed to answer; or

(b) gave an obviously incomplete or irrelevant answer to,

a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter."

[34] Section 14 (1) of the Act provides:

"Insurer to inform of duty of disclosure

***14** (1) The insurer shall, before a contract of insurance is entered into, clearly inform the insured in writing of the general nature and effect of the duty of disclosure.*

(2) An insurer who has not complied with sub-section (1) may not exercise a right in respect of a failure to comply with the duty of disclosure unless that failure was fraudulent."

[35] Basically, section 13 (1) of the Act requires the insured to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that-(a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and or (b) a

reasonable person in the circumstances could be expected to know to be a matter so relevant.

[36] The defendant alleges that (a) the plaintiff had failed to disclose the previous three fires to the subject property and (b) failed to disclose two previous companies refused to continue or cancelled his policy before the policy is issued by the defendant. The plaintiff, as insured should have known these facts are relevant to the decision of the insurer whether to accept the risk. These are not matters that the insurer (the defendant) should have known or in the ordinary course of his or her business the insurer ought to known.

[37] There are no pleadings or particulars in the statement of claim or no issues were raised in relation to section 13 (2) and 14 of the Act. Therefore, I would say that the plaintiff is not entitled to raise any issues which do not arise out of the pleadings in the closing submission.

Previous fire

[38] The subject property had fires on three different occasions: 1. In August 2012, the harvester had caught fire whilst it was harvesting cane at Drasa No.1 Road, 2. In September 2013, there was second fire at Johnson Road, Lautoka and the fire in question.

[39] The plaintiff admits the previous fires in his statement to PIA (*'DE1'*, pages 79-86). In evidence he admitted that there were two fires to the harvester and one was due to electrical shorting. Ashwin Vikash (*'DW2'*), who was working for the plaintiff as an operator had admitted that the harvester caught fire on three occasions, including the fire in question during the time while he was the operator of the harvester. DW 2 confirmed that there were two fires before the one that destroyed the harvester.

[40] The plaintiff had failed to disclose the two previous fires to the harvester to the defendant. The two fires prior to the fire of 11 October 2014 were material facts relevant to the decision of the insurer whether to accept the risk. The plaintiff was under obligation to disclose the material facts in respect of the harvester before the contract of insurance is entered into. The plaintiff had failed to do so.

Had it known, in my view, to the defendant, the defendant would not have accepted the risk.

Cancellation of previous insurance policy

[41] Previously, the plaintiff had two insurance policies over the harvester from Sun Insurance and New India Assurance. Those two policies were subsequently not renewed or cancelled.

[42] By its letter dated 16 January 2012 (*'DE2'*), Sun insurance issued a cancellation notice to the plaintiff that:

> *"16th January, 2012*
>
> *Mr Narend Prasad*
> *P. O. Box 312*
> ***Lautoka***
>
> *Dear Sir,*
>
> ***RE: 14 DAYS CANCELLATION NOTICE***
> ***POLICY NO.: 10003090MVOP000235***
> ***POLICY PERIOD: 04/02/2011 TO 04/02/2012***
> ***REGISTRATION NO.: FG 658***
>
> ---
>
> *Reference is made to the abovementioned policy number 10003090MVOP000235.*
>
> *We hereby give you notice of cancellation of your policy effective 14 days from the date of this letter, in accordance with Clause 2 of the above motor policy.*
>
> *We also refer to the renewal invitation sent by our office in December 2011 and advise that this is now superseded with this notice. All invitations are hereby withdrawn.*
>
> *Upon cancellation, we shall be refunding your unused portion of the company premium if available.*
>
> *For further clarifications, please do not hesitate to contact the undersigned.*
>
> *Yours faithfully*

Sgd-
.....
Madhu Kumar
Senior Customer Services Officer"

[43] Thereafter, New India Assurance, by its letter dated 9 April 2014 ('*DE3*'), refused to continue with the insurance cover. The letter states:

> *"9TH April, 2014*
>
> *Narend Prasad*
> *P.O.Box 312*
> ***LAUTOKA***
>
> *Dear Sir,*
>
> ***RE: MOTOR COMPREHENSIVE POLICY # 3104/10034657/000/01***
>
> *We draw your attention to your Motor policy due for renewal on 25/06/2014.*
>
> *Due to certain underwriting consideration, we regret to inform you that we are unable to continue the insurance cover from renewal.*
>
> *You may kindly make alternative arrangements.*
>
> *Yours faithfully*
> *Sgd-*
> ***(DEVENDRA SAXENA)***
> ***MANAGER – LAUTOKA BRANCH"***

[44] The plaintiff had failed to disclose that two previous insurers refused to continue or cancelled his policy. In the proposal form ('*DE1*'), to question if any other insurance policy was cancelled, the plaintiff answered: '*NO.*'

[45] Although the proposal form was filled in on behalf of the plaintiff by the defendant's agent, Vijay ('*DW4*'), the plaintiff in evidence confirmed that he placed his signature to the proposal form after reading it. Therefore, he must take responsibility of the answers given therein.

[46] A person applying for insurance must disclose all material facts to the insurer (notwithstanding the absence of specific questions). The person is bound to make full disclosure of all facts within his or her knowledge that would be material to the prudent insurer. Whether a fact is capable of being material is a question of law. Whether it is material is a matter of fact. Criminal convictions will generally be material to the particular risk but each case turns on its own facts and that issue can only be determined in light of all the circumstances existing at the time that the proposal is completed (see *State Insurance Ltd v Brightwell HC Hamilton* AP 29/01 [2001] NZHC 754 (16 August 2001) Hammond J).

[47] In evidence, the plaintiff admitted that he did not disclose the two letters sent to him by previous insurers refusing to continue or cancelling the policy he had over the same subject matters, but he told the court that he orally informed of it to the agent, Vijay.

[48] On the evidence, I am satisfied on the balance of probability that the facts that the subject matter had fires on two previous occasions and that the insurance covers issued by the two insurers in respect of the same were discontinued or cancelled were material facts, and the plaintiff had knowledge that would be material to the prudent insurer. I find that those facts were material and it would have affected the particular risk and/or the insurer would have been influenced to charge a higher premium, or imposed other conditions.

Conclusion

[49] For the reasons I have set out above, I would conclude that the defendant was entitled to refuse to indemnify risk on the ground that there was no valid policy at the time when the fire occurred as a result of non-payment of the premium and/or that there was material non-disclosure on the part of the plaintiff. I would, accordingly, dismiss the plaintiff's claim with the costs of $1,000.00, which I have summarily assessed.

The result

1. Plaintiff's claim dismissed.
2. Plaintiff must pay summarily assessed costs of $1,000.00 to defendant.

.....22/5/19.....

M. H. Mohamed Ajmeer

JUDGE

At Lautoka

22 May 2019

Solicitors:

For the plaintiff: M/s Fazilat Shah Legal, Barristers & Solicitors

For the defendant: M/s Diven Prasad Lawyers, Barristers & Solicitors