

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

Civil Action No. 13 of 2012

BETWEEN: **GEETA DEVI & SHAKEEL CHAND MAHARAJ** both of Lot 6
Sekoula Road, Laucala Beach Estate.

1ST PLAINTIFFS

BETWEEN: **GEETA DEVI** of Lot 6 Sekoula Road, Laucala Beach Estate,
Nasinu, Domestic Duties as Administratrix in the Estate of
Kamlesh Chand Maharaj.

2ND PLAINTIFF

A N D: **HOME FINANCE COMPANY LIMITED**

1ST DEFENDANT

A N D: **FIJICARE INSURANCE LIMITED**

2ND DEFENDANT

Before: **Hon. Chief Justice Kamal Kumar**

Counsel: **Mr R. P. Singh for the Plaintiffs**
Mr D. Sharma for the 1st Defendant
Mr R. Prakash and Ms P. Singh for the 2nd Defendant

Date of Judgment: 8 December 2021

JUDGMENT

Introduction

1. On 16 January 2012, the Plaintiffs caused Writ of Summons to be issued with Statement of Claim claiming for payment of \$79,202.02 with interest and costs

allegedly arising out of Group Mortgage Protection Cover issued by the 2nd Defendant which Writ of Summons was amended on 2 March 2012, to correct the 2nd Defendant's name.

2. On 3 and 13 March 2012, 2nd and 1st Defendants filed their Statement of Defence respectively.
3. On 2 November 2012, the Plaintiff filed Reply to Statement of Defence.
4. On 26 November 2012, Plaintiff filed Summons for Directions and on 13 February 2013, being the returnable date of the Summons, Order in terms of the Summons was made.
5. On 4 March 2013, 5 March 2013 and 4 April 2013, the 1st Defendant, Plaintiffs and 2nd Defendants filed Affidavit Verifying List of Documents respectively.
6. On 30 August 2013, the Plaintiffs filed Minutes of PTC between all the parties.
7. On 10 December 2013, the Plaintiffs filed Copy Pleadings and Order 34 Summons.
8. This matter was listed for trial on 23 and 24 July 2014, which date was vacated and trial dates re-fixed for 24 and 25 February 2015.
9. On 17 October 2014, the Plaintiffs filed Application to amend Claim which Application was granted on 18 November 2014.
10. On 22 January 2015, the Plaintiffs filed another Application to Amend the Claim which application was granted on 6 February 2015, and as a result trial dates were vacated and this matter was adjourned to 1 March 2015, to fix trial date.
11. On 9 February 2015, the Plaintiffs filed Amended Statement of Claim.
12. On 19 February 2015 and 3 March 2015, the 1st and 2nd Defendants filed Statement of Defence to Amended Statement of Claim respectively.
13. On 13 March 2015, the Plaintiffs filed Reply to Statement of Defence of both Defendants.

14. On 1st May 2015, this matter was adjourned to 8 and 9 September 2015, for trial.

Background/Undisputed Facts

15. Background/Undisputed facts are as follows:-

- (i) On or about 24th of October 2003, the piece of land known as Naivoco on the Certificate of Title Number 21777 containing an area of Nine Hundred and Ninety-Five square meters situated in the District of Suva in the Island of Vitilevu being Lot 6 on Deposited Plan No. 5431 (**the property**) was transferred to Kamlesh Chand Maharaj, Geeta Devi and Shakeel Chand Maharaj.
- (ii) The said property was mortgaged to the First Defendant, Home Finance Company Limited and registered on 24th October 2003.
- (iii) A Mortgage Protection Insurance Application Form (1st Form) was executed by the 1st Borrower namely Kamlesh Chand Maharaj and the 2nd Plaintiff on the 22nd day of August 2003.
- (iv) The Mortgage Protection Insurance Application Form (2nd Form) was executed by the 1st Borrower namely Kamlesh Chand Maharaj and Geeta Devi and Shakeel Chand Maharaj on the 30th day of May 2005.
- (v) The Second Defendant issued a Mortgage Protection Insurance Policy to Home Finance Company Limited for the benefit of the borrowers namely Kamlesh Chand Maharaj and Geeta Devi for the period 1st April 2010 to 31st March 2011 the terms and conditions of the subject insurance policy are fully stated in the Group Mortgage Life Policy No. 0532HF.
- (vi) Kamlesh Chand Maharaj passed away on 20 August 2010, and Geeta Devi was appointed as Administrator of the Estate of Kamlesh Chand Maharaj.
- (vii) On or about 29 October 2010, the 1st Defendant lodged Mortgage Protection Insurance Claim with the 2nd Defendant.

- (viii) On 7th December 2010, the Defendant declined the Plaintiffs Insurance Claim.

Documentary Evidence

16. Parties by consent had documents subject to Agreed Bundle of Documents filed on 10 January 2014, and Supplementary Agreed Bundle of Documents tendered and marked as following:-

- (i) Agreed Bundle of Documents 1 to 9: Exhibits P1 to P9;
- (ii) Supplementary Agreed Bundle of Documents numbered 1 to 5: Exhibits D1 to D5.

Issues for Determination

17. Although thirteen (13) issues are set out in Part B of Minutes of Pre-Trial Conference this Court after hearing evidence and reading Submissions filed is of the view that issues for determination are as follows:-

- (i) Whether the First Defendant acted as the servant and/or agent of the Second Defendant at all material times.
- (ii) Whether medical condition mentioned in e-mail dated 19 October 2006, from First Defendant to Secondnamed First Plaintiff meant pre-existing medical condition (i.e. prior to 2003 or in 2006).
- (iii) Whether Kamlesh Chand Maharaj had a pre-existing condition in 2003.
- (iv) If answer to issue 17(iii) is "Yes" then whether Kamlesh Chand Maharaj intentionally and/or fraudulently failed to disclose to the Second Defendant all matters or material facts known to him or could reasonably be expected to be known to him which was relevant to the 2nd Defendant's decision as to whether to accept the risk of insurance?
- (v) Whether the First or the Second Defendant have any liability to pay the Plaintiffs for the sum claimed and/or for damages, interests or costs?
- (vi) If so, then what sum (if any) is owed by the Defendants to the Plaintiffs?

- (vii) Whether the Mortgage Protection Insurance Claim by the Plaintiffs properly and lawfully declined by the Second Defendant as per the terms and conditions of the said Policy?
- (viii) Whether the Insured Deceased's death was a direct or indirect result of a pre-existing medical condition?

Plaintiff's Case

18. Secondnamed First Plaintiff, Shakeel Chand Maharaj (hereinafter referred to as “**SNFP**”) during examination in chief gave evidence that:-
- (i) He is an Accountant and Geeta Devi, the Firstnamed First Plaintiff is his mother and Kamlesh Chand Maharaj (Deceased) was his father.
 - (ii) He in the company of his parents approached one Ranjit at Boulevard Branch of the 1st Defendant for a loan to purchase **the Property**.
 - (iii) Ranjit guided them and gave them offer letter with Forms including FNPF Application with stickers placed on pages and where they had to sign.
 - (iv) Ranjit informed them that it is a formality which everyone has to go through.
 - (v) They signed all the Forms and the loan was approved and they bought the Property.
 - (vi) In 2005, they decided to draw one (1) more loan to purchase a vehicle.
 - (vii) At this time, they were guided by Accounts Manager, Sneha Rathod when same procedure was followed and they signed offer letter.
 - (viii) Vehicle loan was amalgamated with housing loan.
 - (ix) After the second loan, whilst sitting at home one day and going through the Bank Statement he noticed a debit of \$1,300.00 for MPI.
 - (x) Since he was not sure what MPI was he called Sneha Rathod next day to verify MPI Cover and its function.

- (xi) Sneha responded that if any party to the loan dies than MPI cover will settle 100% debt with them.
- (xii) When he told Sneha that they did not request for MPI Cover she informed him that they signed the Form for the cover when he requested to sight the Form and went and saw Forms signed by them.
- (xiii) Importance of MPI was not explained to them, all boxes were ticked and they just signed the Form.
- (xiv) He then asked Sneha as to what would be the situation if one of his parents had pre-existing condition and that is when Sneha asked if his parents had any pre-existing condition before taking the loan.
- (xv) He said “yes” and informed Sneha that in 2002, his dad suffered a heart attack.
- (xvi) Sneha then asked him to bring his mum and dad to the Bank so that they can update the records which he did the next day.
- (xvii) They went to see Sneha at Bank, Victoria Parade Branch and she informed them that she will advise whether his dad will be covered or not because of a pre-medical condition.
- (xviii) After the meeting he called Sneha who informed him that his dad is covered for existing loan even though he had a pre-existing condition and that Insurance Officer, Georgina will confirm this via e-mail.
- (xix) Sneha then asked as to why it was not disclosed when they signed the Form and he informed her that they were not aware that the Form was there and in order to have cover in place, medical report is required which was not requested in this case.
- (xx) In reference to Exhibit P5 he confirmed that it is the Application Form which states name of FijiCare Insurance Limited and on the left **and his mum and dad are named as borrowers.**
- (xxi) **He was not listed as the borrower because HFC advised them that MPI Cover can only cover two borrowers.**
- (xxii) He was present when Application Form was signed and it was not explained to them.

- (xxiii) Exhibit P6 is the Form for MPI Cover and was signed by him, his mum and dad on 30 May 2005, at HFC in Boulevard in the presence of Sneha Rathod.
- (xxiv) On 19 October 2006, he received email from Georgina Lasaga stating that existing debt is covered by MPI Cover and any future debt will not be covered due to his dad's medical condition and assured him that his mum and dad were both covered under MPI Cover.
- (xxv) Loan repayment to HFC in 2006 was close to \$900 per month and the MPI Cover premium was \$1,300.00 per year which was paid to the debit of their Account with HFC by HFC.
- (xxvi) After receipt of e-mail from Georgina they continued repayment to the Loan Account and were paying MPI Cover premium which was deducted from their Account at HFC.
- (xxvii) After his father's death in August 2010, he went to HFC and saw Madhu, Account Controller with all documents to process claim for MPI Cover.
- (xxviii) They were advised that it would take about three (3) months to have the claim processed.
- (xxix) After three (3) months they received letter from HFC advising that Insurance Company declined their claim and it was at that time they realized that their claim was dealt with by FijiCare.
- (xxx) After lodging the claim, he was talking to Madhu and an Insurance Officer, both of whom were employed by HFC.
- (xxxi) No contact was made with insurance company during his father's lifetime nor did they meet any officer from the insurance company.
- (xxxii) They were told by HFC from day one that they will be dealing with all their insurance matters.
- (xxxiii) On 21 February 2011, he wrote to HFC about the claim being declined (Exhibit P11) and HFC responded to his letter by e-mail dated 18 April 2011.

- (xxxiv) MPI Cover was for 100% of the debt and balance of debt at time of his father's death was somewhere around \$75,000.00.
- (xxxv) They are still making increased repayments to the Bank.
- (xxxvi) In reference to allegation of not disclosing existing pre-condition being fraudulent, HFC should have advised them that they will not be covered which would have made them to obtain Life Insurance Cover.
- (xxxvii) HFC said they were covered and so they thought they were covered.
- (xxxviii) In addition to MPI Cover, they are claiming for repayments made to HFC and legal costs.

19. During cross-examination by Counsel for 1st Defendant SNFP:-

- (i) Stated that his understanding of e-mail in October 2006, from Georgina Lasaga was that any further loan will not be covered due to his dad's pre-existing condition.
- (ii) Stated that he did not understand that pre-existing condition disqualifies the claim and if you get run over by a bus, MPI would cover and cover is only excluded if death occurs because of pre-existing condition.
- (iii) Agreed that in 2002, his dad suffered heart problem.
- (iv) Confirmed that his dad died from hypertension and heart problem as stated in Exhibit P3.
- (v) Stated that he is 23 years old and in 2003, was 20 years old and obtained Diploma in Accounting.
- (vi) He stated that in 2003, he was working as a Software Consultant for Pro-Systems who is in the business of designing accounting software/programs.
- (vii) Stated that his father was born in 1956, had class 8 education, was self-employed and driving his own van since he was a child.
- (viii) Stated that his father did not complete tax return because his father's income was below the threshold and to file any Form he would take to people and ask them as to what is to be done.

- (ix) Stated that he could not say as to whether his father could read or write in English.
- (x) Stated that he cannot say if his mum was fluent in English.
- (xi) In reference to letter signed by his mum he stated that he wrote the letter and agreed that he has good command of English.
- (xii) Stated that his parents called him to sign the Form (Exhibit P5) which had sticker at places to be signed.
- (xiii) When asked if he is telling the Court that his parents had nothing to do with the fraud he stated "Yes" and that it was their first property and they were excited.
- (xiv) When it was put to him that unless his parents gave the information Exhibit P5 could not have been completed he stated that it could be from offer letter and Loan Application Form.
- (xv) When asked if he agreed that someone had to give information he stated that Form was ready for signing.
- (xvi) Stated that he has no problem in understanding question 2 in Exhibit P5.
- (xvii) When asked as to what did his dad advised the person filling the Form he stated that Form was ready for signing with tags and they did not ask anything.
- (xviii) Stated that he did not sign Exhibit P5 and they said only two (2) borrowers had to sign.
- (xix) Stated that he did not have problem understanding first question in Exhibit P5 and accepted that it is ticked "No".
- (xx) When it was put to him that "No" means no problem he stated that he just signed.
- (xxi) When it was put to him that by saying "No" his dad lied, he stated that it was updated in 2006.
- (xxii) In reference to question 2 in Exhibit P6 he stated that his dad had disease.

- (xxiii) Agreed that at bottom of Form they had to give information and he knew why they wanted information and in the Form opportunity was given to disclose.
- (xxiv) Agreed that he understood what is written under the heading "Important" at the bottom of the Form.
- (xxv) Stated that his understanding as to what is in No. 2 is that they cannot claim because Insurance Company needs to know.
- (xxvi) Stated that name of Insurance Company is FijiCare.
- (xxvii) In February 2002, his dad had to be admitted for seven days when he complained of heart pain and after that his dad had to regularly go to CWM Hospital for checkup on clinic days which he continued doing in 2003/2004.
- (xxviii) Accepted that from February 2003 to August 2003, it was only seven (7) months and his dad was attending clinic on regular basis and only pre-existing condition was heart problem.
- (xxix) Confirmed that his mother had clean bill of health and there was no exclusion for her.
- (xxx) Stated that Lasaga's e-mail said that existing loan will be covered.
- (xxxi) Stated that they should have said his dad is not covered and then he would not have paid the premium.
- (xxxii) Stated that HFC should have told him that if his dad had heart attack he would not be covered.
- (xxxiii) Agreed that Exhibit P6 (MPI Cover Form) was filled on 30 May 2005.
- (xxxiv) When asked why they did not raise insurance premium debit from 2003 to 2005, he stated that he did not look at Statement then, and only saw in 2006.
- (xxxv) Stated that in 2006, they took a loan to buy minivan as the one they had was worn out.
- (xxxvi) Stated that in 2005, he was still working as Software Consultant for the same company.

- (xxxvii) Stated that when second loan came into place, they all signed and documents were not explained.
- (xxxviii) When asked that him being educated, didn't he read the Form he stated he did not and signed at the places marked.
- (xxxix) Stated that when he went to sign Exhibit P6 his details were already on side of the Form with his year of birth being wrong (should have been 1986 instead of 1983).
- (xl) Stated that the 1st Defendant did not give them opportunity to take advise.
- (xli) Agreed that Form was signed voluntarily without any duress, is 60% correct, his dad and mum had no problem.
- (xlii) When it was put to him that adequate ground was given to show insurance company was correct he stated that he just signed.
- (xliii) When it was put to him that someone must have provided details he stated that he does not know and about three (3) borrowers he stated Form was prepared.
- (xliv) Agreed that only his dad had problem who was reviewed in 2006, and that on the face of 2005 Form it is still wrong as he was suffering.
- (xlv) Agreed that Form he signed says FijiCare and HFC MPI Form.
- (xlvi) Stated that the issue arose only in October 2006, when he went to see Sneha.
- (xlvii) Agreed that in 2005, Sneha was present and they did not disclose condition to her.
- (xlviii) When it was put to him that he was given opportunity to read he stated that it had tags at place of signing.
- (xlix) State that he understands that Form can be completed by an officer attending to the borrower.
- (l) When it was put to him that on both occasions the Officer asked his mum and dad if they had medical condition and the answer was "No" he stated that either mum or dad could have answered.

- (li) Stated that when he saw MPI Cover premium in 2006, he contacted Sneha by phone who asked him to see her.
- (lii) Stated that he went and saw Sneha who advised that debt is for MPI premium and when he asked how come HFC paid premium when they never signed any Form.
- (liii) Stated that Sneha showed him the Form which had his signature (Exhibit P6) and explained what MPI is.
- (liv) Stated that he read the Form and saw clause about disease when he asked as to what will happen if they had sickness to which Sneha said that MPI will be declined.
- (lv) Stated Sneha did not ask as why as why he signed unless he knew what he was signing.
- (lvi) When asked where is the Revised Form and it was put to him that there was no Revised Form he stated that he gave it to HFC.
- (lvii) Stated that he does not have copy of Revised Form
- (lviii) When it was put to him that they had all the time to get medical report he stated that they had admission card and not the report and he does not have copy of the card.
- (lix) When asked if it is not true that his dad knew he had current heart condition he answered "No".
- (lx) Agreed that from 2003 to 2005, there was no mention of his dad's heart condition.
- (lxi) When it was put to him that debt is not covered if death result of pre-existing condition he agreed and stated that pre-existence condition was not explained.
- (lxii) When it was put to him that any loan beyond 2006, cannot be covered because of pre-existing condition he stated that they said existing loan was covered.
- (lxiii) Stated that his dad disclosed his pre-existing condition to HFC in September 2006.

- (lxiv) Agreed that HFC had no knowledge or no record of dad's pre-existing condition and stated that no one asked about pre-existing condition.
 - (lxv) Agreed that in 2003 and 2005, no one disclosed pre-existing condition and stated that they were not advised of MPI Cover and at that time and if someone would have asked they would have told.
 - (lxvi) Agreed that after his dad died HFC did everything possible to process the claim (Exhibit P8) and HFC still believes that they have a valid claim.
 - (lxvii) In reference to Exhibit P9 when it was put to him that that was only time HFC came to know the Form was incorrect he stated that HFC was very well aware of and they did not know FijiCare, only knew HFC who gave e-mail saying they are covered.
 - (lxviii) Agreed that after this HFC said their hands are tied and stated that it was HFC's duty to disclose to FijiCare.
 - (lxix) Stated that e-mail from HFC is the only evidence to show that his father informed HFC about pre-existing condition.
 - (lxx) Stated that HFC did not advise them the MPI Cover is payable for death by any cause except heart attack.
 - (lxxi) Agreed that his mum is covered for MPI from 2003, till now.
 - (lxxii) Did not agree when it was put to him that his dad was covered from 2003 with only exception being heart attack.
 - (lxxiii) In reference to paragraph 2 (g) on page 6, under Section D of Exhibit P7 he stated that they should have been advised as they are ordinary person.
20. During cross-examination by Counsel for the 2nd Defendant SNFP:-
- (i) Stated that first time he saw MPI Cover (Exhibit P7) was today (date of trial).
 - (ii) Stated that he filed claim without looking at the Policy.
 - (iii) When it was put to him that MPI Policy (Exhibit P7) would have been with his lawyers in this case he stated that he could not say.

- (iv) Stated he was not aware until 2011 as to who were the parties to Policy and when asked who were the parties he did not answer.
- (v) Agreed when it was put to him that parties were FijiCare (Insurance Company) and HFC (Policy Holder).
- (vi) Stated that main business of HFC is to provide finance and no arrangement was made by FijiCare.
- (vii) Stated that he did not deal with any Manager from FijiCare.
- (viii) Stated that his claim against FijiCare is for MPI Claim lodged through HFC which FijiCare declined.
- (ix) In reference to exclusion clause he stated that he read its letter, knows what it is saying and understands exclusion clause.
- (x) Stated that he was present when Exhibit P5 was signed.
- (xi) Stated that he went to HFC Downtown Boulevard to sign the offer letter when he called his mum and dad to come there.
- (xii) Stated that they signed the offer letter in Ranjit's office and gave it back to him.
- (xiii) Stated that he read about amount of loan, interest and repayment section in the offer letter.
- (xiv) Stated that as security they were to give was old van and something was discussed about mortgage.
- (xv) Stated that he could not remember if Mortgage was given to him for him to look at and whether they signed mortgage with offer letter or some other time.
- (xvi) Stated that the Bill of Sale was to be signed before a lawyer.
- (xvii) Agreed when it was put to him that HFC kept copy of the offer letter, gave him a copy and Bill of Sale/Mortgage was signed later.
- (xviii) Agreed that HFC gave them copy of the offer letter, Bill of Sale and Mortgage for them to sign before a lawyer and that the lawyer explained the offer letter, Bill of Sale and Mortgage to them.

- (xix) Stated that no advise was given on MPI and only documents they had was the offer letter, Bill of Sale and Mortgage.
- (xx) Agreed that he said the MPI Application was part of the offer letter.
- (xxi) When it was put to him that the lawyer must have explained it to them he stated that no MPI Form was given to them.
- (xxii) Agreed that had he known that MPI did not cover he would have taken out life policy for which premium would have been higher.
- (xxiii) Agreed for insurance cover they had to disclose medical condition and in this case medical condition had not been disclosed.
- (xxiv) Agreed that he paid premium and continued doing so and is claiming for amount of loan.
- (xxv) In reference to Exhibit P5 he stated that his parents did not ask him to tell them as to what they were signing.
- (xxvi) Stated that his dad would ask people as to what he is signing if he did not understand it.
- (xxvii) When it was put to him that if he is suggesting his dad understood what he was signing he stated that his dad signed thinking that its mere formality.
- (xxviii) Agreed that they were not to sign anything in the Bank, but they went and his father did not ask him anything before signing.
- (xxix) Agreed that information provided in Exhibit P5 and P6 is incorrect.
- (xxx) Stated that he is not really sure about relationship HFC and FijiCare had in relation to this case.

21. During re-examination SNFP:-

- (i) Read paragraph 3 of Exhibit P11.
- (ii) Stated that Exhibit P5 is HFC Limited's MPI Application Form and there is no place for it to be witnessed by a lawyer.
- (iii) Stated that Exhibit P5 was signed in Ranjit's office at HFC Downtown Boulevard.

(iv) Stated that Exhibit P6 is again HFC MPI Application Form which was not taken to lawyer for signing and only Mortgage document was taken to lawyer, G.P. Lala & Associates for signing.

22. Geeta Devi Maharaj, the Firstnamed First Plaintiff and Second Plaintiff (hereinafter referred to as **“FNFP”**) during examination in chief gave evidence that:-

- (i) In October 2003, her husband wanted to buy land, he talked to Ranjit of HFC and she went with her husband and son Shakeel Chand Maharaj to HFC.
- (ii) At HFC her husband did the talking on their behalf.
- (iii) Ranjit gave them a document saying it is the offer letter and asked them to initial and sign.
- (iv) Persons involved in preparing work for the loan was herself, her husband, their son and Ranjit from HFC.
- (v) Green stickers were fixed on the offer letter which they removed and signed.
- (vi) They did not sign any other document.
- (vii) When shown Exhibit P5 and P6 she confirmed that Exhibit P5 has her and her husband's signature whilst Exhibit P6 has her, her husband and their son's signature which were dated 11 November 2003 (Exhibit P5) and 30 May 2005 (Exhibit P6).
- (viii) Exhibit P5 was signed at Ranjit's office, the Manager for HFC at Boulevard.
- (ix) Did not know how Exhibit P5 was completed but her signature is on it.
- (x) Details on the Form which is completed was supplied by Ranjit.
- (xi) When asked who supplied details about their name, date of birth etc. she stated that Ranjit did and they told him.
- (xii) Apart from their signature, Ranjit wrote detail on the Form.
- (xiii) As for the ticks in small boxes, Ranjit filled everything, they just signed.

- (xiv) She did not see her husband do anything in respect to those boxes but she does not know what he did and the Form was passed to him after she signed.
- (xv) Exhibit P6 was signed by three of them at Boulevard and Ranjit was present.
- (xvi) She was sure that Ranjit was present when they signed Exhibit P6.
- (xvii) She does not know who wrote on the Form.
- (xviii) They were given Mortgage document which all of them took to G.P. Lala & Associates.
- (xix) In 2005, they obtained additional loan to buy van which loan was added to home loan and repayment for total loan was roundabout \$900.00 per month.
- (xx) They received Statement from HFC every six months and in 2006, they saw the Statement to see how much payment is going through.
- (xxi) After reading the Statement they asked son to find out about \$1,300.00 deduction for MPI as it was huge amount for them.
- (xxii) Her son called HFC from work and informed them that Accounts Officer Sneha Rathod asked them to go and see her.
- (xxiii) On the third day, herself, her husband and son went to see Sneha Rathod who was looking after their Account at Victoria Parade.
- (xxiv) At the meeting her husband asked what was MPI when Sneha informed that if Kamlesh Maharaj or Geeta Devi passed away then MPI will cover.
- (xxv) She then said to Sneha that they only bought the house, they did not know about MPI deduction and they did not do any medical.
- (xxvi) Sneha then asked if they had any problem when in response she said she has nothing but husband had heart attack.
- (xxvii) Sneha asked if they had anything about medical condition and then they gave husband's card which Sneha took and said that she will e-mail my son.

- (xxviii) They asked Sneha if the premium would be high when she responded by saying that she will e-mail.
- (xxix) Sneha e-mailed saying that currently husband is covered 100%.
- (xxx) Confirmed Exhibit P10 as the e-mail and that name on email is that of Georgina Lasaga and read her name and e-mail.
- (xxxi) Her son explained the contents of e-mail to her.
- (xxxii) Her husband died on 20 August 2010, and they are making repayments until now.
- (xxxiii) After discussing with her son she wrote letter to HFC (Exhibit P11).
- (xxxiv) They claimed under MPI but the claim was not paid.
- (xxxv) HFC told them that her husband is not covered under MPI and as a result he went with her son to Kohli & Singh.
- (xxxvi) Her son dealt with Kohli & Singh who lodged papers in Court.
- (xxxvii) They claiming what is written in the e-mail and want HFC to cover her husband.
- (xxxviii) They claiming against HFC because when they received letter they knew that Insurance Company and HFC are connected.
- (xxxix) They came to know about MPI when Sneha explained to them as to what MPI was in 2006, she knew that it meant Mortgage Protection Insurance.
- (xl) They are not claiming against any other organisation.
- (xli) When asked who provided for Insurance Cover she stated that she does not know and was doing all payments to HFC.
- (xlii) When her husband died HFC debt was between \$79,000.00 to \$80,000.00.
- (xliii) They are claiming for balance debt and repayments made with nothing else.

23. During cross-examination by Counsel for the First Defendant FNFP:-

- (i) Agreed that in 2003, her husband went by himself to HFC and spoke to Ranjit and she was not present there.
- (ii) Agreed that when her husband came home and told her what he discussed with Ranjit and stated that he told Ranjit he had no property, have four children and he is one old man.
- (iii) Agreed that she was not aware of full extent of the discussion and stated that when her husband went to meet Ranjit he did not take anything as they had nothing and was living in squatter area.
- (iv) Stated that she did not know how many times her husband met Ranjit between the period he saw Ranjit for the first time and the time she went with him to HFC.
- (v) Agreed that when she was called she signed loan offer documents which was in typed form with her name as borrower and that she never met Ranjit prior to that.
- (vi) Stated that she does not know who gave Ranjit all the information but husband met Ranjit first.
- (vii) Accepted that her husband had all relevant details about her and her son.
- (viii) When it was put to her that when she signed the offer letter she signed MPI Application Form she stated she does not know but there were documents with tags and she was told to sign.
- (ix) Agreed that there is difference between offer letter and MPI Form which was handwritten and someone inserted details by hand.
- (x) Agreed that MPI Form was signed when she was sitting in front of Ranjit and stated that she does not know who completed the Form.
- (xi) Stated that she did give information on MPI Application Form and husband may have given as he met with Ranjit.
- (xii) Denied that she sat with Ranjit and gave details to be filled in the Form and stated that when she met Ranjit he said Form was there for her to sign which Form had information and the Form was not explained.

- (xiii) Agreed that in the Form, husband's name is written in capital writing and whilst others are in cursive writing.
- (xiv) When it was put to her that other details are in different handwriting she stated that she does not know who wrote it, whether Ranjit or husband.
- (xv) When it was put to her that someone had to ask about their sickness before ticking "No" in the boxes she stated that it was not asked at that time but was asked in 2006.
- (xvi) Stated that her husband knew that she was not sick for last twelve months from that date.
- (xvii) Stated that she did not notice the ticks when she signed the Form and no one forced her to sign because she was happy that they were getting a place.
- (xviii) Stated that she went up to Class 8, and at the request of their Counsel, read the heading on the Form.
- (xix) When asked if she was told that loan would be for 20 year period she stated that she was only told to sign and everything else was for her husband.
- (xx) Agreed that her husband told her to sign the documents and he was in charge of the borrowing.
- (xxi) Stated that she does not know if her husband ticked "No" in respect to his column.
- (xxii) Stated that twelve months before Form (2003) was completed her husband had medical condition as he had heart attack.
- (xxiii) Agreed that it was a pre-existing condition and husband had heart attack before he took the loan.
- (xxiv) Stated that she could not recall if they were getting Statement from HFC as her husband was dealing with HFC.
- (xxv) Agreed that in 2005, she signed another MPI Form as they were taking loan for a van (Exhibit P6) which she signed voluntarily.

- (xxvi) Agreed that handwriting of her husband's name and her name are straight and other details are in slanting form.
- (xxvii) Stated that she signed the Form after her husband went to the counter and enquired about it.
- (xxviii) Agreed that her husband gave details as he is the one who arranged this loan.**
- (xxix) Agreed that she signed the Form (Exhibit P6) because husband asked her to sign.**
- (xxx) Stated that since she knew that payments were being made and they had things she was not concerned about mortgage or mortgage insurance.
- (xxxi) Agreed that she was saying that as long as loan repayments are going she did not have to worry about anything and stated that her children had a place.
- (xxxii) Stated that when her husband went to fill Form at HFC she was home.
- (xxxiii) Agreed that she signed Exhibit P6 when her husband asked her to sign and stated her husband may have given the details in the Form.**
- (xxxiv) In 2006, repayment went high as they had home loan and van loan and Statement showed \$1,300.00 MPI.
- (xxxv) Stated that they discussed about it, her son called HFC and on the third day they (all three) went to see Sneha Rathod when Sneha explained to them about the MPI and were informed that her and her husband were covered for MPI.
- (xxxvi) Stated that Sneha informed them that if she or her husband passes away loan will be paid and then they asked Sneha as to why they did not ask for medical report as her husband had heart attack.
- (xxxvii) Accepted and agreed that it was for the first time they disclosed pre-existing condition with no disclosure of pre-existing condition made prior to 2006, and stated that no one asked.

- (xxxviii) Stated that her husband told Sneha about medical condition at the counter and gave Sneha his medical card which was in his van.
- (xxxix) At the 2006 meeting, her husband was talking to Sneha and he was giving all the information to Sneha.
- (xl) Stated that she understood what was being discussed at the meeting and at that meeting Sneha explained to them that if there is pre-existing medical condition then they will not be covered.
- (xli) Stated that they knew her husband's pre-medical condition will not be covered when they received e-mail from Sneha Rathod saying that they are covered but any new loan will not be covered because her husband had heart attack.
- (xlii) Did not agree when it was put to her that anything to do with her husband's heart attack will not be covered and stated that Sneha said it would be covered.
- (xliii) Agreed that MPI covered both herself and her husband and if she dies MPI will cover.
- (xliv) Stated that Sneha told them that if her and/or her husband dies from any sickness, MPI will cover.
- (xlv) Stated that Sneha Rathod sent e-mail to them but when e-mail was shown she said it was Georgina.
- (xlvi) Stated that e-mail refers to the telephone conversation and it came after they had telephone conversation with her son Shakeel Maharaj. When it was put to her that during the conversation in 2006, it was disclosed to Ms Lasaqa that her husband had heart attack she stated that it was nothing like that and all e-mail said was that it was covered.
- (xlvii) Stated that her understanding as to why Ms Lasaqa said her and her husband were covered was because her son asked if her husband was covered.
- (xlviii) When it was put to her that they interpreting paragraph 1 of e-mail that way after she discussed with their lawyers she stated after her husband passed away.

- (xlix) Agreed that her lawyers told her what the e-mail meant and lawyers said that whatever pre-existing condition was, it was covered.
- (l) Agreed that Exhibit P11 is her letter head which her son helped to type and she dictated it.
- (li) When asked to read last paragraph on page 1 of said letter she stated that she could not read.
- (lii) When 1st sentence of last paragraph on page 1 was read and asked if she understood, she stated that she understood it after interpretation.
- (liii) When asked if they provided medical report in reference to what is stated at last paragraph on page 1 of the letter she stated her husband gave a card.
- (liv) When it was put to her that medical report is prepared by hospital or doctor she stated that HFC did not ask for it but later sent the e-mail.
- (lv) Stated that in September 2006, they did not approach CWM Hospital for medical report as HFC did not ask for it and her husband was a patient.
- (lvi) In reference to rest of last paragraph she stated that they thought they should have saved the premium on MPI Cover as her husband was sickly.
- (lvii) Stated that she is asking for refund of premiums paid as only her son Shakeel is working and making payment.
- (lviii) When it was put to her that premiums being paid is for her and Shakeel Maharaj and agreed that current borrowers are herself and her son Shakeel Maharaj.
- (lix) Did not agree when it was put to her that from 2006 to 2010, all risks were covered except for her husband's death by heart attack and stated that heart disease was included.
- (lx) Agreed that her husband died of heart attack.

24. During cross-examination by Counsel for the Second Defendant SNFP:-

- (i) **Stated her husband had enquired with Ranjit, HFC Manager for loan, they did everything and after that she went with her husband and son Shakeel to sign the offer letter.**
- (ii) Stated they all sat at a table when Ranjit spoke to them and said aunty Form is ready for signing.
- (iii) Stated that she signed the offer letter which Ranjit said was Loan Application and she did not see the offer letter until day of giving evidence.
- (iv) Stated that she did not know how many copies they signed and that there were green tags at places to be signed.
- (v) Stated that after they signed her husband was given copy of offer letter.
- (vi) Stated that her husband told her about signing of the Mortgage and they went to HFC and then to G.P. Lala & Associates.
- (vii) Stated that they did not sign any other documents at G.P. Lala & Associates and Mortgage documents was given to them to take to G.P. Lala & Associates.
- (viii) In reference to Exhibit P5 she stated that when the offer letter and mortgage was signed, than changed answer to say when mortgage was signed then changed answer to say she could not recall but she did sign.
- (ix) Stated she signed the offer letter and documents after husband said for her to sign at places marked as she trusted her husband.
- (x) Stated that she did not know what she signed as it was attached to mortgage and her husband spoke to Ranjit and they only signed.
- (xi) Stated that she signed Exhibit P6 when she went to HFC with her husband, saw Sneha Rathod who attended to the signing and same procedure was followed.
- (xii) Stated her husband said that they were taking additional loan for van and so they signed offer letter and the Form.
- (xiii) When it was put to her that there is no offer letter for 2nd loan she stated that she signed Form thinking its offer letter.

- (xiv) Stated that Sneha asked them to sign other documents but she was not sure, what documents she signed.
- (xv) Stated she does not know if she signed Bill of Sale and that she signed one (1) Form with Sneha Rathod.
- (xvi) Stated that when she signed Exhibit P5 in 2003, she was aware that husband was suffering from heart disease.
- (xvii) When it was put to her that she also had knowledge that her husband was receiving treatment for heart disease she stated "No" he went for check-up and was given medicine.
- (xviii) Agreed that in 2002, her husband had first heart attack and her husband and her son Shakeel were all aware about it and this fact was not given to HFC when loan was taken.
- (xix) Stated that she was aware about her husband's medical condition in 2005, as he was going for checkup which information was not given to HFC in 2005.
- (xx) Agreed that her husband died of heart attack and now knows that MPI did not cover pre-existing condition.
- (xxi) Agreed that her claim is against HFC and want to know why FijiCare declined cover when premium was being paid.
- (xxii) Stated that she knows claim was declined because they ticked wrong way.
- (xxiii) Denied seeing letter from FijiCare declining claim (Exhibit P9) and letter being explained to her by her lawyer.
- (xxiv) Stated that she did not know that Exhibit P9 has been with lawyer for some time.
- (xxv) When it was put to her that she said they have no claim against FijiCare she stated she wants to know why they declined claim, they know HFC and it is between HFC and FijiCare.

25. During re-examination FNFP:-

- (i) Stated that the e-mail was sent to Shakeel Maharaj which said that any loan after 2006 will not be covered and no loan was taken after 2006.
 - (ii) Stated that as for claim against FijiCare she wants to know why claim was declined between HFC and FijiCare.
26. First Defendant called Georgina Lasaga of 43 Tacirua Heights, Tamavua, Insurance Officer (“**1DW1**”).
27. **1DW1** during examination in chief gave evidence that:-
- (i) She commenced employment with Sedgwick (Fiji) Ltd which was bought by Marsh and McLennan and after that was employed by WG Insurance and in 2006, joined HFC as Insurance Officer.
 - (ii) Currently she is employed by AON (Fiji) Ltd and she joined AON in 2012.
 - (iii) Her duties at HFC were to deal with all insurance covers for clients including MPI.
 - (iv) Previously brokers Marsh Ltd arranged MPI on behalf of HFC and then HFC decided to bring it within HFC and to have Agency Licence.
 - (v) MPI was issued by FijiCare Insurance.
 - (vi) She is familiar with cover drawn by FijiCare for HFC and fundamentals of MPI Cover which is to cover loan debt and:-
 - (a) Cover could be in multiple (100% cover), proportionate (50% cover) and single (100%).
 - (b) Was compulsory for those who took loan.
 - (c) Clients were to comply with duty of disclosure before Application was accepted.
 - (vii) MPI Cover for death or disability is paid except in case of undisclosed pre-existing medical condition.
 - (viii) If pre-existing medical condition is disclosed then it is upto FijiCare as to whether to write cover or not and in most case it would not.
 - (ix) MPI Policy is drafted by FijiCare and HFC is its Agent.

- (x) Terms of MPI Policy cannot be altered by HFC employees and HFC employees cannot give undertaking on behalf of FijiCare.
- (xi) Could not recall telephone conversation with someone called Shakeel Maharaj in 2006.
- (xii) E-mail (Exhibit P10) was written by her addressed to Shakeel Chand Maharaj with subject being MPI Cover.
- (xiii) She did not check file to see what existing cover was.
- (xiv) Prior to 2006, she was not aware of any pre-existing medical condition.
- (xv) Agreed that it was her interpretation that medical condition existed in 2006.
- (xvi) If there was any pre-existing condition in 2003, MPI Cover will not cover existing loan.
- (xvii) What is stated in later part of e-mail is the general advice they give for person applying for MPI Cover.
- (xviii) In her e-mail she said for them to contact Sneha Rathod, the Accounts Controller.
- (xix) When it was put to her that her e-mail is being interpreted as HFC knew about earlier condition and said existing loan is still covered she said "No" and stated that if member had medical condition in 2002, he would not be covered and e-mail relates to condition he was in 2006.
- (xx) Apart from telephone conversation no medical report or anything of that sort was sent to her.
- (xxi) She had nothing to do with MPI Application Form by Kamlesh Chand Maharaj.
- (xxii) Sherese Peckham joined HFC after she left HFC.
- (xxiii) Relationship between FijiCare and HFC is that FijiCare is the Insurance Company and HFC is its Agent who sells cover on behalf of FijiCare.
- (xxiv) HFC places policy with FijiCare to cover loans given by it.

(xxv) When clients come with pre-existing medical condition they are advised that cover will not be paid if death occurs because of pre-existing condition.

(xxvi) Apart from the e-mail she did not deal with this matter.

28. In answering questions by the 2nd Defendant's Counsel **1DW1**:-

- (i) Stated that HFC took Agency in 2006, and prior to that HFC was not Agent and dealt through brokers Marsh Ltd.
- (ii) Stated that the Policy in this case was existing Policy arranged by Marsh Ltd.
- (iii) Stated that information on MPI Application is provided by Applicant and cover is given by FijiCare after Form is sent.

29. During cross-examination **1DW1**:-

- (i) Stated that FijiCare granted Insurance Agency Licence to HFC.
- (ii) Stated that in this instance all dealings for MPI Cover by customers was with HFC.
- (iii) Stated that at the time she wrote the e-mail HFC was FijiCare's Agent and HFC is paid commission.
- (iv) Disagreed when it was put to her that Sneha Rathod discussed this matter with her and asked her to talk to Shakeel and **stated that her conversation was with Shakeel and e-mail was purely on basis of the conversation with Shakeel.**
- (v) When it was put to her that she wrote existing cover for mum and dad she stated that his parents are covered for previous loan and new loan will not be covered as he told about medical condition on phone.
- (vi) Stated that at time of writing e-mail she knew Shakeel's dad had medical condition since 2006.
- (vii) Agreed that what is stated at point 3 of e-mail she got from HFC and stated what is stated at point 4 she got that from telephone conversation.

- (viii) Agreed that it is compulsory to take out MPI Cover.
30. First Defendant called Rosie Fong of 1 Vereva Street, Nausori, Bank Officer as its second witness (“**1DW2**”).
31. **1DW2** during examination in chief gave evidence that:-
- (i) She holds a Masters Degree in Business Administration, has been working for HFC since 3 April 2006, and prior to that she was employed by ANZ Bank.
 - (ii) Her being the Line Manager, Manager Insurance reports to her and she is involved in processing Applications and dealing with enquiries.
 - (iii) She dealt with various officers in FijiCare and in relation to MPI she dealt with Jasmine Chand and Joeli Radio with Jasmine Chand being the main contact person.
 - (iv) She is aware about claim was lodged by Kamlesh Chand Maharaj’s (deceased) wife and son and she never met Kamlesh Chand Maharaj.
 - (v) She also did not meet Shakeel Maharaj or his mum.
 - (vi) Claim was referred to Sherese Peckham, Manager Insurance who completed the claim from information they had and lodged it with FijiCare.
 - (vii) MPI Application Form is completed at Accounts level and they lodge claim with FijiCare.
 - (viii) When asked if Kamlesh Chand Maharaj was covered she stated that by looking at MPI prepared and everything they had, pre-existing medical condition was not declared.
 - (ix) She is familiar with Exhibit P8 which is MPI Scheme lodgment Form and HFC’s letter.
 - (x) Cover was 100% loan and that is why they put \$79,202.02 which is extended loan amount at that date.

- (xi) When they were completing Form they did not see anything about pre-existing condition and since proposal and loan were clear they lodged the claim on 29 October 2010.
- (xii) After they lodged the claim, they informed the customer that it has been lodged and processing time will be about 90 days and this case claim was declined.
- (xiii) Once claim is lodged they allow customers three (3) months holiday period which is time for processing and receipt of response from FijiCare.
- (xiv) Reason claim was declined was that, FijiCare found out that client had heart hypertension and had pre-existing condition in 2003 which was not disclosed at time of proposal.
- (xv) Exhibit P9 is letter from FijiCare informing that claim has been assessed and declined due to non-disclosure of pre-existing condition.
- (xvi) MPI Cover premium was paid by HFC and it was upto FijiCare as whether to pay or decline the claim.

32. During cross-examination 1DW2:-

- (i) Stated that MPI premium was paid from customer's loan account at yearly interval.
- (ii) Stated that the claim was lodged on that basis that there was no pre-existing medical condition recorded in the proposal.
- (iii) Stated that they had staff by name of Sneha Rathod and Georgina Lasaqa.
- (iv) Stated that she heard in Court that customer raised the fact that Kamlesh Chand Maharaj had medical condition prior to the cover but at the face to face meeting with the customers after the cover was declined, they showed her e-mail from Georgina which she did not see before.
- (v) Stated that she heard Georgina say she wrote e-mail but the e-mail was not on the file when they lodged the claim.
- (vi) Stated that she cannot say it was fault of officers concerned and e-mail was based on telephone conversation writer had.

- (vii) Stated that record of Sneha's discussion with customers is not in insurance file which only had Applicant's Form and Claim lodged.
 - (viii) Agreed that in terms of Point 1 in e-mail (Exhibit P10) cover was for existing loan which was based on telephone conversation Georgina had.
33. During re-examination 1DW2:-
- (i) In reference to Exhibit P10 (E-mail) stated that MPI Cover stated that from 2003 and in 2005 there was another loan and in both proposals no pre-existing medical condition is disclosed.
34. The Second Defendant called Jasmine Chand of Lot 17 Nakasi Road, 9 Miles, Nasinu, Claims Manager ("**2DW**").
35. **2DW** during examination in chief gave evidence that:-
- (i) She has Diploma in Management Studies, currently works as Claims Manager for the 2nd Defendant and prior to being appointed Claims Manager she worked for FijiCare for sixteen (16) years.
 - (ii) Part of her job is to handle claims including MPI Claims.
 - (iii) MPI Claims cover loans from HFC for which they have Group Policy Agreement with HFC from 2006, and prior to that Agreement was with Marsh Ltd. which was from 2000.
 - (iv) She handled the claim by Geeta Devi and Shakeel Chand Maharaj which claim was lodged by HFC.
 - (v) Exhibit P8 is HFC letter lodging claim for Kamlesh Chand Maharaj.
 - (vi) Part of processing claims is that:-
 - (a) They carry out investigation by obtaining medical history of deceased from various hospitals and doctors in area where client resides.
 - (b) After that claim is discussed with Managing Director and decision is made on basis of information found out about pre-existing medical condition.

- (vii) In this instance pre-existing medical condition was heart condition being main one with other sickness from 2003 as stated in CWM Special Report.
- (viii) Exhibits D1 to D5 are medical reports dated 10 March 2004, 6 June 2005, 12 August 2005, 23 March 2006 and 10 November 2010 from CWM Hospital.
- (ix) Medical Report dated 10 November 2010, was part of their investigation and investigation was completed after receipt of medical reports.
- (x) Decision was made on the claim and claim was declined.
- (xi) Exhibit P9 is the letter from FijiCare signed by her informing that claims is declined which in summary was that Kamlesh Chand Maharaj had pre-existing medical condition when he took loan in 2003 and 2005, and on both these occasions he did not disclose his pre-existing medical condition.
- (xii) Referred to Part 3 Section D(2)(f)(g), Section M and Section N of Exhibit P7 (Group Mortgage Life Policy No. 0532HF).
- (xiii) Decision to decline claim was based on those provisions of Policy.
- (xiv) Agency licence with HFC was in 2006 and prior to that there was no Agency licence.
- (xv) HFC did not have any authority to vary terms of Policy and any changes need to be discussed with FijiCare and endorsed by it.

36. In answering questions by Counsel for the 1st Defendant **2DW**:-

- (i) Stated that after the claim was declined no discussion took place between HFC and FijiCare.
- (ii) Agreed that the decision to approve and decline claim is entirely a matter for FijiCare.
- (iii) Agreed that grounds for declining claims is at bottom paragraph on Page 1 of Exhibit P9 which have two pivotal grounds being non-disclosure and section D(f)(2)(f).

- (iv) When asked as how did they deduce that death was direct result of 2003 sickness she stated death certificate confirmed what is in medical report.
- (v) Agreed that it is her analysis.
- (vi) Stated that in reference to Section N of Exhibit P7 (Policy) she chose “to reduce liability” and her reason was that non-disclosure was fraudulent.
- (vii) She did not cancel the Policy.

37. During cross-examination **2DW**:-

- (i) Stated that decision to decline claim was by FijiCare in particular Peter McPherson, the Managing Director who was out of the country during trial.
- (ii) She worked out grounds for refusal which was obtained from the medical reports/death certificate and she wrote the letter (Exhibit P9).
- (iii) Agreed that the Medical Reports (Exhibits D1 to D5) were from 2003 to 2010, and during that period premium was paid.
- (iv) Stated that they check on medical record when claim is made and when borrower discloses in the Application Form.
- (v) When it was put to her that during the seven (7) years she did not check medical record, she stated that they do not do it until claim is received.
- (vi) Stated that in cases of claim being determined because of non-disclosure, they always quote those sections.
- (vii) Agreed that Section N of Policy talks about consequence.
- (viii) When asked if Section N(a) was considered she stated it wasn't and they could choose either.
- (ix) Agreed that the contract was not cancelled.
- (x) Stated that reducing the liability means they can reduce it by 100% and not only 50%.
- (xi) Agreed that to decline the claim under Section D(2)(f) she relied on Exhibits D1 to D5.

- (xii) When it was put to her that she did not have any information that Kamlesh Chand Maharaj's death was as a direct or indirect result of treatment sought by him prior to twelve (12) months of loan, she stated that prior to receipt of the claim he did not disclose on the Form they had.
- (xiii) Stated that she never met Kamlesh Chand Maharaj, Shakeel Chand Maharaj or Geeta Devi and all dealings were with HFC.
- (xiv) Stated that when loan was given HFC was not their Agent and they became Agent in April 2006.
- (xv) Agreed that Exhibit P5 (the Application Form) is dated 23 August 2003 and stated that that Form is printed by FijiCare.
- (xvi) Stated that she had no idea who filled this Form as they do not get involved in filling the Form.
- (xvii) Stated that FijiCare does not deal directly with Bank's customers and that they only come into play when claim is lodged.

38. During re-examination **2DW**:-

- (i) Stated that FijiCare still receives premium and policy is not cancelled.
- (ii) States that reason policy is not cancelled because it is multiple cover and covers surviving borrowers.

Whether the First Defendant acted as Agent of the Second Defendant at all material time

39. This Court accepts the evidence of 1DW1 and 2DW that:-

- (i) In 2003 and 2005 when the Plaintiffs signed Application for MPI cover are obtained loans to buy real property and van, MPI Cover was arranged by Marsh Ltd, the Brokers.
- (ii) The First Defendant took Agent Licence from Second Defendant in 2006.

40. Hence, this Court has not hesitation in holding that at material times (Exhibits P5 and P6 were signed) the First Defendant was not acting as Second Defendant's Agent.

Whether medical condition mentioned in e-mail dated 19 October 2006, from First Defendant to Secondnamed First Plaintiff meant pre-existing medical condition prior to 2003 or in 2006

41. This Court after analyzing the Plaintiffs, 1DW1's evidence and assessing the demeanour of witnesses makes following finding of facts:-

- (i) In 2006, the Secondnamed First Plaintiff called First Defendant to enquire about MPI cover.
- (ii) The phone call was not about MPI Cover premium but to enquire about the position if his father had medical condition.
- (iii) SNFP did not disclose his father's medical condition prior to 2003 or 2005 but what was in 2006.
- (iv) If he had, then there is no reason why the First Defendant would not have sought further details as their interest in MPI Cover would be prejudiced.
- (v) Condition mentioned in e-mail dated 19 October 2006 (Exhibit P6) meant medical condition in 2006.

42. This Court holds that the e-mail dated 19 October 2006 (Exhibit P10) did not in any way relate to Kamlesh Chand Maharaj's medical condition prior to that e-mail and the "**medical condition he (Kamlesh Chand Maharaj) has**" relates to Kamlesh Chand Maharaj's medical condition in 2006, and not prior to that.

Whether Kamlesh Chand Maharaj had a pre-existing condition in 2003

2003 - Housing Loan

43. Medical Report dated 12 August 2005, from CWM Hospital (Exhibit D3) states as follows:-

*“Re: MR. KAMLESH CHAND MAHARAJ
DOB: 22/7/56
NHN: 320129302*

The above named patient was admitted on February 17-23, 2003 for acute anterior myocardial infarction and hypercholesterolemia. His hospital course was uneventful. He has been followed up in the clinic regularly from the time he was discharged from the hospital. However, hospital records showed that his last clinic visit was on 25 October 2004.

*Alan Mamerto Garvez, MD
Consultant Physician”*

44. Whilst the medical report said he was admitted for “acute myocardial infarction and hyper-cholesterolemia” no evidence was led to establish that Kamlesh Chand Maharaj or his family was then told by the medical officer that Kamlesh Chand Maharaj had a medical condition.
45. No evidence has also been led to suggest that after being discharged from hospital on 23 February 2003, Kamlesh Chand Maharaj had a medical condition.
46. This Court fails to understand as to why the Registrar of CWM Hospital or any Medical Officer was not called to lead evidence of Kamlesh Chand Maharaj’s medical condition.
47. Even if Kamlesh Chand Maharaj did have pre-existing medical condition did he:-
- (i) know about and failed to disclose it to the Defendants?
 - (ii) If he did know, then whether the non-disclosure was fraudulent.
48. After analyzing the evidence and demeanour of witnesses this Court finds that:-
- (i) When the Application for MPI Cover was completed the information in the Form relating to Kamlesh Chand Maharaj and Geeta Devi Maharaj was given by Kamlesh Chand Maharaj to Ranjit Singh of 1st Defendant;

- (ii) Form was completed by Ranjit Singh on the basis of information provided by Kamlesh Chand Maharaj.
- (iii) In early 2003, Kamlesh Chand Maharaj did suffer a mild heart-attack which was “uneventful”.
- (iv) MPI Application Form was signed by Kamlesh Chand Maharaj and Geeta Devi in the 1st Defendant’s office at places marked with green stickers by one of its officers.
- (v) Since, the heart attack suffered by Kamlesh Chand Maharaj was “uneventful” and no evidence was led to establish that Kamlesh Chand Maharaj was notified about any pre-existing medical condition the information provided by him to 1st Defendant was innocent and not fraudulent in any form.

2005 MPI Application Form (Exhibit P6)

49. After analyzing the evidence and demeanour of witnesses this Court finds that:-
- (i) Information in the 2005 MPI Application Form was provided by Kamlesh Chand Maharaj.
 - (ii) Application Form was filled the officer of the 1st Defendant.
 - (iii) First Plaintiffs and Kamlesh Chand Maharaj signed the Form as directed by the 1st Defendant.
50. This Court again in absence of evidence has doubt as to whether Kamlesh Chand Maharaj knew that he had a pre-existing medical condition in May 2005.
51. Medical Report dated 12 August 2005 (Exhibit D3) which states that Kamlesh Chand Maharaj’s hospital course as uneventful and that Kamlesh Chand Maharaj’s last clinic visit was on 25 October 2004, more than seven (7) months before MPI Application Form was completed.
52. Does this mean that Kamlesh Chand Maharaj had recovered and did not have any existing medical condition in 2005 or did he think he did not have one?

53. Even though medical report dated 10 November 2010, after the death of Kamlesh Chand Maharaj states that he had been regularly followed up it does not produce any specific dates.
54. This Court finds that when 2005 MPI Application Form was completed Kamlesh Chand Maharaj was not made aware that he had pre-existing medical condition and as such non-disclosure of any pre-existing medical condition was not fraudulent on his part.
55. It is well established that a contract of insurance is a contract uberrimae fidei in that parties to the contract of insurance must act in utmost good faith when entering into the contract.
56. It is apparent from submissions filed that both parties by their Counsel do not seem to differ from the law and principles governing the contract of insurance.
57. In **Pan Atlantic Insurance Co. Ltd v. Pine Top Insurance Co. Ltd** [1995] 1 AC 538 the Court of Appeal stated as follows:-

“The duty of disclosure is distinct from the requirement not to misrepresent facts. It arises out of the fact that a contract of insurance is a contract uberrimae fidei. **A person seeking to be insured must disclose to the intended insurer any facts within his or her knowledge that are material, that is to say which would affect the mind of a prudent insurer in deciding whether or not to provide cover (Mayne Nickless Ltd v. Pegler [1974] 1 NSWLR 228). Facts are material if the person seeking the insurance knows that the intended insurer regards them as so, even though he or she might otherwise not regard them as material (Glicksman v. Lancashire and General Insurance Co. Ltd. [1925] 2 KB 593).** The manner in which a person seeking insurance generally finds out what the intended insurer regards as material is by reference to the questions which the intended insurer requires him to answer. Of course, some persons may have such knowledge by reason of their having worked in the insurance industry or in connection with it. Mr Stanton submitted that, because Dr. Dass was a medical practitioner, he would have had that knowledge. However, there was no evidence that he ever carried out medical examinations on behalf of an insurer or that he had any specialist qualifications relevant to the assessment of medical risks. In **Condogianis v. Guardian Insurance Co. Ltd.** [1921] 1 AC 125 the House of Lords held that, if upon the fair construction of a question which an insurer requires to be

answered the person seeking to be insurer gives a truthful answer, the insurer cannot contend that it wanted more information”.

58. Insured is therefore required to disclose:-
- (i) Facts within insured’s knowledge that are material to the insurer making a decision on an application for insurance cover;
 - (ii) Insured believes and knows the information/answer to be true.
59. The common law principles of good faith and duty of disclosure have been codified by Insurance Law Reform Act 1996 (“**ILRA**”).
- Umesh Prasad v. Colonial Mutual Life Assurance Society Ltd** Civil Action No. 56 of 2001 (Labasa) (19 June 2007).
60. Relevant provision of the ILRA are sections 13, 20 and 23 which provide as follows:-

- “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 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.*

“20.-(1) *This Section applies where the person who became the insured under a contract of general insurance upon the contract being entered into:-*

- (a) failed to comply with the duty of disclosure; or**
- (b) made a misrepresentation to the insurer before the contract was entered into,** but does not apply where the insurer would have entered into the contract for the same premium and on the same terms and conditions even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into.

(2) If the failure to comply with the duty of disclosure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.

(3) If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract (whether under sub-section (2) or otherwise) has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place him or her in a position in which he or she would have been if the failure had not occurred or the misrepresentation had not been made.”

“23.-(1) *In any proceedings by the insured in respect of a contract of insurance that has been avoided on the ground of fraudulent failure to comply with the duty of disclosure or fraudulent misrepresentation, **the court may, if it would be harsh and unfair not to do so,** but subject to this Section, **disregard the avoidance,** and if it does so, shall allow the insured to recover the whole, or such part as the court thinks just and equitable in the circumstances, of the amount that would have been payable if the contract had not been avoided.*

(2) The power conferred by sub-section (1) may be exercised only where the court is of the opinion that, in respect of the loss that is the subject of the proceedings before the court, the insurer has not been prejudiced by the failure or misrepresentation or, if the insurer has been so prejudiced, the prejudice is minimal or insignificant.

(3) In exercising the power conferred by sub-section (1) the court-

- (a) shall have regard to the need to deter fraudulent conduct in relation to insurance; and**
- (b) shall weigh the extent of the culpability of the insured in the fraudulent conduct against the magnitude of the loss that would be suffered by the insured if the**

avoidance were not disregarded, but may also have regard to any other relevant matter.

- (4) *The power conferred by sub-section (1) applies only in relation to the loss that is the subject of the proceedings before the court, and any disregard by the court of the avoidance does not otherwise operate to reinstate the contract.*

Whether the 2nd Defendant's refusal to pay the amount owing to the First Defendant by the borrowers was justified

61. This Court accepts the First Plaintiff's evidence that both the MPI Application Forms were signed by them without the Form being explained to them or any opportunity given to them to seek advice.
62. This Court also accepts that copy of the Insurance Policy was not given to the borrowers or contents explained to them.
63. Surely detailed explanation of the Application for MPI Cover or Part II Section D, Part V Sections C, M and N would have put the borrowers on notice that failure to disclose any pre-existing medical condition would result in their claim being declined.
64. No evidence has been led to establish that the borrowers were explained the contents of the MPI Application Form or given an opportunity to seek advice from elsewhere.
65. When the persons entering into security documents or mortgage protection insurance contract are not educated and are vulnerable because of their age or experience duty of good faith calls upon the insurer or the its Agent to exercise due care to ensure that the borrowers understand what they were entering and fairly comprehend the clauses pursuant to which their claim has a chance of being declined.
66. This Court finds that the 2nd Defendant has failed to establish by tangible evidence that Kamlesh Chand Maharaj's conduct in not disclosing any pre-existing condition was fraudulent.
67. The 2nd Defendant's decision to deny the claim was therefore unjustified.

Damages

68. This Court finds that it is just and fair that the 2nd Defendant pay the amount owing by the Plaintiffs as borrowers as at 29 October 2020.
69. Since, Plaintiffs as borrowers totally relied on the 1st Defendant and dealt with the 1st Defendant in completing the MPI Application Form the 1st Defendant it is only fair that the 1st Defendant be held responsible for its action.
70. This Court is of the view that fairness dictates that the 1st Defendant refund all repayments made by Plaintiffs as borrowers and pay interest on that sum at the rate of 3% per annum.

Costs

71. This Court takes into consideration that:-
- (i) Trial lasted for two (2) days;
 - (ii) All parties filed submissions.
 - (iii) Substantial part of judgment is against 2nd Defendant.


Orders

72. This Court Orders that:-
- (i) The 2nd Defendant do pay the 1st Defendant a sum of \$79,202.02.
 - (ii) The 2nd Defendant refund to the 1st Defendant all mortgage protection insurance premium paid on behalf of the Plaintiffs by the 1st Defendant from 29 October 2010 upto date of payment of \$79,202.02 under paragraph 72(i) of this Judgment.
 - (iii) The 1st Defendant reverse all interest, Bank charges debited to Plaintiffs loan account charged with effect from 29 October 2010, until date of

payment of the sum of \$79,202.02 under paragraph 72(i) of this Judgment.

- (iv) The 1st Defendant pay to the 1st Plaintiffs the total amount of loan repayment made by Plaintiffs in respect to their loan Account with 1st Defendant with effect from 29 October 2010 to date payment of the sum of \$79,202.02 under paragraph 72(i) of this Judgment.
- (v) The 1st Defendant do pay the 1st Plaintiffs interest on the sum to be refunded under paragraph 72(iv) of this Judgment at the rate of 3% per annum from 16 January 2012, (date of Writ of Summons) to date of this Judgment.
- (vi) The 1st Defendant do pay the 1st Plaintiffs cost of this action assessed in the sum of \$1,500.00.
- (vii) The 2nd Defendant do pay the 1st Plaintiffs cost of this action assessed in the sum of \$3,500.00.




K. Kumar
Chief Justice

At Suva
8 December 2021

Solicitors:

Kohli and Singh for the Plaintiff

R. Patel Lawyers for the 1st Defendant

Mishra Prakash & Associates for the 2nd Defendant