

IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 135 of 2019

BETWEEN

MOHAMMED AZAM having a place of business at 88 Uci Road, Waqadra,

Nadi and carrying on business under the name and style of

MALOLO FISHER SPORTS.

PLAINTIFF

AND

SUN INSURANCE COMPANY PTE LIMITED a limited liability
company incorporated in Fiji and having its registered office at

Grnd & Level 1 Sun Insurance, Kaunikula House,

Laucala Bay Road, Suva.

DEFENDANT

Counsel : Mr. Charan R. for the Plaintiff
Mr.Vulaono A for the Defendant

Date of Hearing : 01st March 2023

Date of Judgment : 24th March 2023

JUDGMENT

[1] The plaintiff filed this writ of summons and statement of claim seeking an order against the defendant to indemnify the plaintiff for the loss and damages caused to the fishing charter vessel known as Bill Fever. The plaintiff also claims general damages for breach of contract and damages under section 147 of the Fijian Competition and Consumer Commission Act 2010.

[2] The loss and damages claimed by the plaintiff are as follows (Paragraph 5):

(i)	2x380hp Cummins six cylinder turbo charged inboard engines at NZ\$39,242 each	- NZ\$ 78,484.00
	ZF85A Transmission x 2 at NZ\$9,747.00	- NZ\$ 19,494.00
	Electronic Throttle and shift x2 at NZ1750 each	- NZ\$ 10,054.00
	2 nd Station throttle head x 2 at NZ1750 each	- NZ\$ 3,500.00
	Total for 2 propulsion engine packages	- NZ\$ 111,532.00
(ii)	Electrical including wiring and computer boards	- FJ\$ 7,500.00
(iii)	NZ150 Marine Batteries x 3 at \$300.00 each	- FJ\$ 900.00
(iv)	Salvaging	- FJ\$ 6,000.00
(v)	Marine Sound Proof Insulation Material	- FJ\$ 800.00
(vi)	Boat crane hire to dry dock	- FJS 3,000.00
(vii)	Berthing	- FJ\$ 4,000.00
(viii)	Storages charges at \$20.00 per day	

- [3] The plaintiff's case is that the defendant agreed with him to insure the hull and superstructure, machinery, electronic equipment safety equipment and miscellaneous/fishing equipment of the vessel valued at \$397,000.00 for the period commencing from 21st December 2017 to 21st December 2018. However, when the vessel while berthing at Port Denarau Mariner took water in and partially sank causing damage the defendant refused to indemnify the plaintiff.
- [4] The defendant's position is that it rightfully denied to indemnify the plaintiff's claim on the ground that at the time leading up to and at the inception of the insurance policy, the plaintiff, his representative and/or agent intentionally failed to disclose to the defendant material facts and circumstances which would have influenced the defendant in fixing the premium and to determine whether the defendant will take the risk of insuring the plaintiff.
- [5] The particulars of non-disclosure as averred in the amended statement of defense are as follows (*Paragraph 6 of the amended statement of defence*):
- a. Failure to disclose a previous insurance claim by the plaintiff his representative and / or agent against its previous insurer in respect to theft of the plaintiff's vessel *KOICA 1 Nabila* whilst moored at Yanuca Beach at Shangri La Resort, Nadroga on or about 26 October 2014.
 - b. Failure to disclose a previous insurance claim by the plaintiff his representative and / or agent against its previous insurer in respect of its vessel "*Exclusive*" which sank whilst moored at Yanuca Beach at Shangri La Resort, Nadroga on or about 04 April 2016.
 - c. Failure to disclose a previous insurance claim by the plaintiff his representative and / or agent against its previous insurer in respect of its vessel "*Lewa Ni Wai*" which sank whilst berthed at Denarau Marina, Nadi on or about 25 April 2010.
- [6] The defendant also averred that the plaintiff prior to entering into the policy, the plaintiff his representative and/or agent misrepresented its claims history to the defendant on 14th December 2017 which influenced the defendant in fixing the

premium and to determine whether the defendant will take the risk of insuring the plaintiff. The particulars of misrepresentation are as follows:

- a. Misrepresented that the plaintiff had only one previous claim and it was related to a vessel *ZIKR*.
- b. The plaintiff knew or ought to have known about its other claims mention in paragraph 6 herein.

[7] At the pre-trial conference the parties admitted the following facts:

1. The plaintiff is the owner of commercial game fishing charter vessel known as Bill Fever (the vessel).
2. The defendant is an insurance underwriter.
3. The plaintiff entered into a policy of insurance with the defendant on or about 21st December 2017.
4. A marine hull policy was issued to the plaintiff by the defendant with policy number 10023180MHUP000182.
5. The marine hull policy provided cover from 21 December 2017 to 21 December 2018.
6. On 4 March 2018 while at the Port Denarau Mariner the vessel had taken in water and partially sank causing damage to the vessel's inboard engines, electrical wiring, computer boards and other general damages.

[8] At the hearing both counsel agreed that the only issue to be determined is whether the alleged non-disclosure and/or misrepresentation referred to above on the part of the plaintiff make the defendant entitled to refuse the claim of the plaintiff. Although there is no admission by the parties, the learned counsel for the defendant informed court that if this is decided in favour of the plaintiff the defendant would not contest the amount claimed by the plaintiff in paragraph 5(i) of the statement of claim. The learned counsel for the plaintiff informed court, that the plaintiff would limit his claim to paragraph 5(i) of the statement of claim.

[9] Out of the three previous claims the plaintiff had disclosed only one previous claim. The defendant's witness testified that if they knew about the other claims it would not have granted the insurance policy.

[10] Sections 18 of the Marine Insurance Act 1961 -

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

[11] Section 19 of the Marine Insurance Act 1961 -

- (1) Subject to the provisions of this section, the assured must disclose to insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.
- (2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.
- (3) In the absence of inquiry the following circumstances need not be disclosed, namely:-
 - (a) any circumstance which diminishes the risk;
 - (b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
 - (c) any circumstances as to which information is waived by the insurer;
 - (d) any circumstance which it is superfluous to disclose by reason of any express or implied warranty.
- (4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

[12] Hard copies of certain e-mails exchanged between the defendant and the under writer (Marsh) on 14th December 2017, were tendered in evidence by the defendant's witness.

[13] On 14th December 2017 at 1:13pm Avikash Ram from Sun Insurance requested the details of the directors/owners and claims history of the client for current cover. This e-mail was forwarded to the plaintiff for his comments and in reply the plaintiff said, "**Only zika got claims \$52670.60 ONLY**". The plaintiff did not disclose the other three previous claims made on 25th April 2010, 26th October 2014 and 04th April 2016 in breach of sections 18 and 19 of the Marine Insurance Act 1961.

[14] The learned counsel for the plaintiff cited in his submission in reply to the defendant's submissions, the following paragraphs from **Colinvaux's Law of Insurance**, 9th Edition (2010);

Brokers are independent agents appointed by the assured to carry out various functions, including advice and placement, post-contractual assistance and claims handling services...

It is generally accepted that a broker, being the appointee of the assured, acts as the agent of the assured in giving advice to the assured and in dealing with the insurer. Consequently, any errors made by the broker while acting on the assured's behalf and within the scope of his actual and ostensible authority binds the assured, any information received by the broker from the assured is not deemed to have been received by the insurers and any information provided by the broker is not to be taken as having been received from the insurers.

[15] The learned counsel for the plaintiff submits that it is the duty of the broker to advise the plaintiff the definition of the relevant terms in the context of the negotiations and at no point the broker raised any issue nor did the broker request further advice or

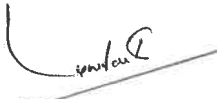
particulars from the defendant with regard to the questions that were provided by the defendant.

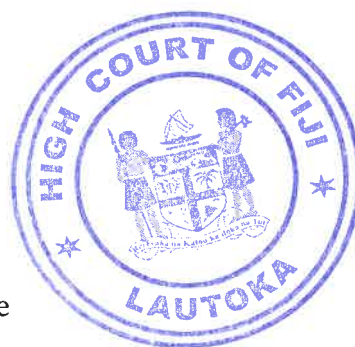
[16] It appears that the plaintiff is trying to blame the broker for his own mistakes. When the broker requested for certain information it was the duty of the plaintiff provide the broker with complete and correct information. In this instance knowing very well that there were three other previous insurance claims, it appears that the plaintiff had purposely withheld that information. The broker acted as the agent of the plaintiff and any mistake of the broker is considered as a mistake of the principle and the principle must suffer for his agent's mistakes. The defendant cannot be held liable for the mistakes of the plaintiff's agent.

[17] For the reasons set about the court is of the view that the defendant had the right to repudiate the plaintiff's claim.

ORDERS

- (1) The plaintiff's claim against the defendant is dismissed.
- (2) The plaintiff is ordered to pay \$5,000.00 as costs to the defendant.


Lyone Seneviratne



JUDGE

24th March 2023