IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 43 of 2015

BETWEEN

KALABO INVESTMENT LIMITED a limited liability company having its registered office at 411 Fletcher Road, Nabua, Suva carrying on business in Suva and elsewhere in Fiji under the name and style of "Shop N Save Supermarkret"

PLAINTIFF

AND

THE NEW INDIA ASSURANCE COMPANY LIMITED a foreign company duly incorporated under the laws of India and having its place of business in Fiji at Suva carrying on business as an insurance underwriter.

DEFENDANT

Counsel	:	Mr. Young C.B. with Mr. Patel B.C. for the Plaintiff Mr. Gordon R. for the Defendant
Dates of Hearing	:	7th & 8th November 2023

Date of Judgment : 12th February 2024

JUDGMENT

[1] The plaintiff in its amended statement of claim seeks the following reliefs:

A. Judgment in the sum of $1,488,349.14 or for so much thereof as is found due and payable by the defendant in respect of the material damage claim.

B. Judgment in the sum of $1,034,804.45 or for so much thereof as is found due and payable by the defendant in respect of the business interruption claim.

C. Consequential damages resulting from breach of the insurance contract pleaded in paragraph 13 [to be quantified at the trail].

D. Interest on the judgment sum at 10% compounded pursuant to section 34 of the Insurance Law Reform Act 1996 and calculated from (4) four weeks after the date of the lodgment of the claim (or from such other date as the court may decide) to the date of payment.

E. Indemnity costs of this proceeding.

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

1. The plaintiff is, and was at all material times, a duly incorporated company having its registered office at 411 Fletcher Road, Nabua, Suva carrying on business in Suva and elsewhere in Fiji under the name and style of "Shop N Save Supermarket".
2. The defendant at all material times, a foreign company duly incorporated under the laws of India and having its place of business in Fiji at Suva carrying on business as an insurance underwriter.
3. At all material times the plaintiff operated and still operates supermarket business in Tavua Town.

4. By a material damage and business interruption policy of insurance number 1124/10057167/003/01 (the policy) the defendant agreed to insure and indemnify the plaintiff for the period 22 April 2014 to 22 April 2015 against the risks and for the amounts mentioned in the policy including against loss and damage by fire to the plaintiff's business and stock and contents in the Tavua shop.

5. The policy provided, inter alia:

(a) Insured:

Kalabo Investment Limited trading as Shop N Save Supermarket etc

(b) Business:

All business of whatsoever kind conducted by the insured but not limited to wholesalers, retailers, shopkeepers, supermarket operators etc.

(c) Perils Insured:

All risks of physical loss or damage – unintended and unforeseen by the insured – not otherwise excluded by the policy.

(d) Insured premises:

Included plaintiff's premises at Main Road, Tavua Town.

(e) Indemnity:

If any physical loss or damage - untended and unforeseen by the insured – happens to any insured property during the period of insurance, the company will indemnify the insured for that loss or damage.

(f) Material Damage cover for Tavua Shop:

Stock	$1,000,000.00
Contents	$750,000.00
Demolition Cost	$100,000.00

Claim Preparation Cost	$200,000.00

(g) Business Interruption Cover:

$16,250,000.00 each and every loss.

(h) Progress Claim Payments:

Where loss or damage has given rise to a valid claim on this Policy, the Company will make progress claim payments on production of acceptable evidence of insured loss. If the aggregate of progress payments exceeds the total amount of loss as finally adjusted, the insured will immediately refund the difference to the company.

(i) Claim Preparation Cost:

This policy extends to cover the reasonable cost of fees incurred by or on behalf of the insured of assessing or preparing any claim made under the policy,

6. On 10 June 2014, whilst the policy was current, the plaintiff's stock and contents in the Tavua shop were destroyed or damaged by fire and consequently the plaintiff's business was interrupted.

7. The defendant was duly advised of the loss and material damage claim was lodged in terms of the policy ("the material damage claim") on 1 August 2014 as follows:

Stock	- $1,097,702.61
Contents	- $415,487.30
Debris Removal	- $41,400.00
MD Claim Preparation Cost	- $12,093.40
	$1,566,683.31
Less 5% excess	$78,334.17
	$1,488,349.14

8. The defendant has since paid $1,361,483.75 of the material damage claim to the plaintiff pursuant to the summary judgment obtained on 27 July 2015. The defendant has also paid $129,561.75 as interest on $1,361,483.75 for the period 1 September 2014 to 20 August 2015 leaving the balance of $1,563.45.

[3] At the commencement of the further hearing of this matter the learned counsel for the defendant objected to continuing with the trial already heard partly. However, in the judgment of the Court of Appeal, on an appeal against an interlocutory order of this court made by a previous Judge, had order to continue the partly-heard trial. The Court of Appeal, when it made this order must have expected to continue the trial before the same Judge who head it partly, but that Judge is no more a Judge in the High Court of Fiji. The learned counsel for the plaintiff submitted that this court cannot override the decision of the Court of Appeal. Although it is not fair by the parties to deliver a judgment on the evidence adduced before another Judge, this court is bound to follow the directions of the Court of Appeal unless it is a *per incuriam* order.

[4] In the amended statement of claim filed on 03rd July 2015 the plaintiff claimed $1,034,804.45 for material damage. On 5th August 2015 the court made order or consent ordering the defendant to pay the plaintiff $1,362,483.75 with 10% compound interest. It is a fact admitted by the parties that the defendant has since paid $1,361,483.75 with $129,561.75 as interest and what is remaining to be paid as material damage is $1,563.45.

[5] In the submissions of the learned counsel for the plaintiff it is submitted that there is a material damage claim of $ 87,320.05 cents for non-food items. Once the judgment is given of consent without any reservation the plaintiff is not entitled to add any additional claim to the same relief.

[6] In the original statement of claim the plaintiff did not claim damages for business interruption claim and on 03rd July 2015 the plaintiff filed the

amended statement of claim adding a new claim for business interruption which is covered by the insurance policy.

[7] In the insurance policy at page 11 it is stated;

> If, during the Period of Insurance:
>
> - any property of part used or to be used by or for the insured at the Premises for the purpose of the Business is Damaged; and
> - the business carried on by the Insured at the Premises is consequently interrupted or interfered with;
>
> The Company will pay to the Insured the amount of loss resulting from the interruption or interference as provided in this Policy for each item of Insured Interest.

[8] The witness Praveen Rohit Chand, Operations Manager had testified before the previous Judge that the fire occurred on early morning of 11th June 2014 they started moving things out of the shop on 16th June 2014. The witness explained the nature of the items stored in the super market. The documents P2 and P4 contain the items destroyed by fire. However, since the material damage has already been paid by the defendant, there is no need to consider this evidence in detail.

[9] The issue before this court is the amount the plaintiff is entitled to recover from the defendant for business interruption. The plaintiff and the defendant, in this regard, relied on two different reports prepared by their experts.

[10] The plaintiff's report had been prepared by Fawcett Faire Claim Consultants and the witness Peter John Faire testified at the trail. He tendered a document (PE23) prepared by him stating his qualifications and experience as an Insurance Loss Adjuster. The report relied on by the defendant has been prepared by Matson Driscoll & Damico Pty. Limited (MDD report) who are Forensic accountants. The court must first decide which report it should

rely on in deciding the amount the plaintiff is entitled to recover for business interruption.

[11] Mr. Peter John Faire prepared the report for Fawcett Faire Claim Consultants FFL report). He tendered a three page document giving all his qualifications and experience in the area of loss adjustment. Since it is a document with 17 paragraphs I will not reproduce its contents in my judgment but I will hear summarize his qualifications and experience as a Loss Adjuster.

[12] He is a Retired Fellow of the UK Chartered Institute of Loss Adjusters. He has been a member of the said Institute since 1979. He was the President of the UK Chartered Institute of Loss Adjusters Australian Division in 1984 and 1985 and in that capacity he was a member of the Council of the UK Institute. For more than 45 years he has specialised in accounting and insurance investigation, quantification and settlement of Material Damage and Business Interruption insurance claims.

[13] The witness had been a partner in Chambers Fawcett, Charted accountants in New Zealand since 1975, then as a partner of Fawcett Faire & Co, Chartered Loss Adjusters from 1979 and a Senior Principal in the global GAB Robins from 1985. In 1988 he had been appointed Asia Pacific as the Asia Pacific Chief Executive of GAB Robins, based in Sydney and he was responsible for the development and management of the 62 GAB Robins' offices throughout Australia, New Zealand, Asia [including Japan, China and India], and the Pacific. In 2020 he had been retained by the UK Government's financial regulator, the Financial Conduct Authority [FCA], as a Business Interruption claims expert to assist FCA in a test case against several insurers relating to Covid-19 Business Interruption claims that the FCA alleged were not being properly processed or paid.

[14] From the above it is absolutely clear that Mr. Faire is a very well qualified and experienced Loss Adjuster.

[15] The defendant's expert report had been prepared by David Meritz who is a Forensic Accountant (MDD report).

[16] Forensic accountants are experienced auditors, accountants, and investigators of legal and financial documents that are hired to look into possible suspicions of fraudulent activity within a company; or are hired by a company who may just want to prevent fraudulent activities from occurring. They also provide services in areas such as accounting, antitrust, damages, analysis, valuation, and general consulting. Forensic accountants have also been used in divorces, bankruptcy, insurance claims, personal injury claims, fraudulent claims, construction, royalty audits, and tracking terrorism by investigating financial records. Many forensic accountants work closely with law enforcement personnel and lawyers during investigations and often appear as expert witnesses during trials.

[17] His educational qualifications are;

Bachelor of Commerce (Cost and Management Accounting) - University of Natal (South Africa)

Bachelor of Law - University of Natal (South Africa)

Master of Business Administration - Calwest University (USA)

Post Graduate Diploma in Business Studies (Dispute Resolution) - Massey University (New Zealand)

Certified Management Accountant (CMA)

Certified Fraud Examiner (CFE)

Fellow - Australian Institute of Loss Adjusters (FAICLA)

[18] As per his work history he had been a Loss Adjuster from 1992 to 1996. However, there is no evidence that he is a qualified Insurance Loss Adjuster or he worked as an Insurance Loss Adjuster.

[19] In **Kumar v Krishna** [2022] FJCA 128; ABU0068.2016 (30 September 2022) the Court of Appeal held;

> It is the duty of the court to assess the value of evidence that is admitted and to draw the necessary inferences from it. A witness is entitled to only state the facts from his observations and knowledge. An expert witness may express an opinion, however, it is the duty of the judge to be satisfied that the expert possesses the knowledge and skill in respect of the particular matter on which his opinion is sought, and the judge must then arrive at his independent opinion. There must be neither suspicion nor undue deference to expert opinion, nor an indiscriminate adoption of expert opinion. The function of the court is not to abdicate its duty to decide.

[20] The counsel for the plaintiff took the witness through the entire report (PE22). The witness said he went to Ba and Tavua and talked to the employees of the plaintiff and they provided him with the information. In cross-examination the witness admitted that he visited the site in 2017 and the fire occurred in 2014. From his own evidence it is clear that his inspection could not have been of much help in preparing the report.

[21] To prepare this report Fawcett Faire Claim Consultants has used the following information which has been attached to the report;

(i) The detailed Loss Model containing all relevant data, analysis, and calculations upon which the claim is based.

(ii) Consolidated financial statements for Kolobo Investment Limited for the years ended 30 June 2013, 2014 and 2015.

(iii) Income Statement Unit (supermarket) for the years ended 30 June 2013, 2014 and 2015.

[22] In this matter there are three reports showing the business interruption loss. In FFL report the business interruption loss is $843,399.00, in PWC report the loss of gross profit is $1,034,804.45 and in MDD report the loss is $503,461.00.

[23] The plaintiff's business interruption claim is based on the PWC report. However, the plaintiff did not call any witness to explain calculation of the amount appears in the report.

[24] The defendant called Mr. Andrew Michael Cotton to explain the MDD report and the learned counsel for the defendant took the witness through the report. In cross examination the witness said that he went to see the shop after the fire within 24 hours and he took some photographs but he the defendant did not tender any of the photographs which could have assisted the court to a very great extend in deciding as to which report it could place reliance on.

[25] In the MDD report it is stated that the plaintiff did not provide any supporting document to show as to how the Gross Profit Sum insured of $15,000,000 was calculated. In the insurance policy at page 3 under the heading of Special Limits - Section 2 it is stated:

> Gross Profits including Wages/Salaries:.....$15,000,000
>
> Additional Expenditure:.....$ 500,000
>
> Rent Payable:.....$ 500,000
>
> Claim Preparation Costs:.....$ 250,000

[26] If they studied the insurance police they could have found out the gross profit sum insured.

[27] With regard to the rent it is stated in the MDD report as follows:

> FFL states that there was no saving in rent, which continued to be paid throughout the Indemnity Period. While FFL accept that that there is a rent abatement clause in the lease agreement for the Tavua building, it claims that rent was not abated because a) KIL continued to use the premises for storage and b) even if there was an abatement this would have "*generated a corresponding loss of rents claim insured under the same policy*".

[28] They have been provided a copy of the lease agreement which was for 20 years and renewable.

[29] The MDD report states further that;

> Regarding FFL's comment that the premises was still used as storage, no further details or information has been provided as to a) what was stored, b) whose property was stored, c) how long it was stored there for, d) why and e) how much space being used. However, even if property stored at the premises belonged to KIL, we would expect there would be at least a partial abatement given KIL was unable to use the property for the purposes it was intended for.

[30] There is no evidence that MDD requested for any information about the payment of rent during that period.

[31] The report says that we expect that there should have been a full rent abatement afforded to KIL, and at a minimum a partial rent abatement. For the purpose of this measurement, we assumed a full rent abatement of $63,806 across the Indemnity Period bases on the rent figures we have been provided with, which differ from the rent per Lease Agreement.

[32] From the above it is absolutely clear that this finding also totally based on assumptions which do not have any evidentiary value.

[33] As the method of calculating loss of turnover MDD has used post fire sales figures of three months (October 2014 to December 2014) whereas in the other two reports they have used pre-fire sales figures. The learned counsel for the plaintiff, in this regard, cited the decision in **The Financial Conduct Authority v Arch Insurance (UK) LTD and Others** [2021] UKSC 1 where in was held:

> The standard method used in business interruption insurance to quantify the sum payable under the policy takes an earlier period of trading for comparison purposes. In most wordings this is the calendar year preceding the operation of the insured peril. A "standard turnover" or "standard

revenue" is derived from the turnover of the business in this period. This figure is then compared with the actual turnover or revenue during the indemnity period. The results of the business in the comparator period are also used to derive a percentage of turnover that represents gross profit. The rate of gross profit is then applied to the reduction in turnover to calculate the recoverable loss. Increase in the cost or working during the indemnity period is also typically covered.

[35] The plaintiff also claims consequential damages for delaying the settlement of Material damage and Business interruption claim. However, the plaintiff did not adduce any evidence to prove this claim.

[36] For the reasons set out above I am of the opinion that the MDD and PwC reports cannot be relied upon and the court will rely on the FFL report.

ORDERS

(1) The defendant is also ordered to pay the plaintiff $843,399.00 for business interruption.

(2) The defendant is also order to pay the plaintiff interest on the judgment sum pursuant to Law Reforms (Miscellaneous Provisions)(Death and Interest Act and Insurance Law Reform Act 1996.

(3) The defendant is also ordered to pay the plaintiff costs of this matter on solicitor client indemnity basis.

HIGH COURT OF FIJI
LAUTOKA

Lyone Seneviratne

JUDGE

12th February, 2024