IN THE SUPREME COURT OF FIJI
[APPELLATE CIVIL JURISDICTION]

Civil Petition No. CBV 001/2016
(On Appeal from Court of Appeal No. ABU 0022/2012)

BETWEEN : **GURBACHANS FOODTOWN LIMITED**

Petitioner

AND : **THE NEW INDIA ASSURANCE COMPANY LIMITED**

Respondent

Coram : **Hon. Mr. Justice Suresh Chandra, Justice of the Supreme Court**
Hon. Mr. Justice Brian Keith, Justice of the Supreme Court
Hon. Mr. Justice Kankani Chitrasiri, Justice of the Supreme Court

Counsel : **Mr. H. Nagin for the Petitioner**
Mr. A. K. Narayan for the Respondent

Date of Hearing: **14 October 2016**

Date of Judgment: **28 October 2016**

JUDGMENT

Chandra, J

1. I agree with the reasons and conclusions of Justice Kankani Chitrasiri.

Keith, J

2. I have had an opportunity to read a draft of Chitrasiri J's judgment in this case. I agree with him that special leave to appeal should be refused, and that we should make the orders which he proposes. I add a few words of my own to explain why I think it was unnecessary for the lower courts to concern themselves with the proper construction of the policies of insurance in this case.

3. The two principal issues which the insured's claim raised were (i) what was the peril which had caused the damage to its stock and equipment, and (ii) whether damage caused by that peril was covered by the policies of insurance. The question to be decided as a preliminary issue related only to the first of those issues. The High Court was not called upon to address the second issue in the hearing of the preliminary issue, because it was accepted that if the peril which had caused the damage had been flooding, the damage would not have been caused by a peril covered by the policies, and the insured's claim would have to be dismissed with costs. So there was no need for the trial judge to have addressed the extent of the cover in the hearing of the preliminary issue, unless to do so had been necessary in order to determine the peril which had caused the damage to the insured's stock and equipment. This was not such a case.

4. It follows that the extent of the cover would have needed to be addressed in the trial proper only if the peril which had caused the damage had been held in the hearing of the preliminary issue to have been something other than flooding. Since the extent of the cover was not an issue which was to be addressed, or needed to be addressed, in the hearing of the preliminary issue, it was not appropriate for the High Court or the Court of Appeal to have been addressed on the proper construction of the terms and conditions of the policies, nor was it appropriate for the High Court or the Court of Appeal to have considered the topic. And with respect to Chitrasiri J, I do not think it appropriate for the topic to be addressed now.

5. As for what peril had caused the damage to the insured's stock and equipment, I agree entirely with the conclusion of Chitrasiri J. The evidence before the High Court admitted of only one factual conclusion, namely that the damage to the insured's stock and equipment occurred as a result of water seeping into the insured's premises because a local river had burst its banks, rather than as a result of the torrential rain getting into the insured's premises. Of course, the reason why the river burst its banks was because of the torrential rain and strong winds brought by the cyclone. In those circumstances, the question for the High Court in the light of those facts should have been: when it comes to causation, do you look at the immediate cause of the damage (which was the seepage of water into the premises)? Or do you look at the more remote cause of the damage (which was what caused that seepage, namely the river bursting its banks)? Or do you look at the even more remote cause of the damage (which was what caused the river to burst its banks, namely the rain and wind brought by the cyclone)?

6. The authorities say that where there could be said to be more than one cause of the damage, you look for what the "real" or the "efficient" (by which is meant effective) or the "dominant" cause was, even if that was the more remote in time. That is to be determined by commonsense by reference to what the man in the street would think – in this case by the man in the street with experience of tropical weather conditions. And it is what such a man would think was the effective cause of the damage that matters, rather than what he would think about the effect of the terms of the policy. In my opinion, the man in the street would have thought that the effective cause of the damage to the insured's stock and equipment was the seepage of water into the premises as a result of the river bursting its banks, rather than by the rain and wind brought by the cyclone which had caused the river to burst its banks. In other words, the Court of Appeal was right to conclude that it had not been reasonably open to the trial judge to find that it had not been caused by flooding.

7. I cannot depart from this case without commenting on why the insured's lawyers conceded that if the cause of the damage was held to be flooding, the insured's claim had to be dismissed. The two policies were a fire insurance policy (policy no

922625/1111/006913) and a consequential fire loss policy (policy no 922625/1122/006915). The latter can be put to one side for present purposes as it only covered damage caused by fire, lightning or explosion, none of which could be said to have caused the damage to the insured's stock and equipment. The relevant policy was therefore the fire insurance policy. That covered damage caused by a number of perils including "Storm and/or Tempest", which was subject to the special condition referred to by Chitrasiri J in his judgment. However, when that policy had been renewed (by renewal certificate no 922625/1111/002517), the policy was extended to cover other perils including hurricanes. There is no express provision to the effect that the special condition relating to "Storm and/or Tempest" applied to hurricanes, but I assume that either the insured's lawyers accepted that the policy must be construed as having done so, or the claim under the policy was made on the basis that the peril which caused the damage was a "Storm and/or Tempest" rather than a hurricane.

Chitrasiri, J

Background

8. This is an application made to the Supreme Court seeking special leave to appeal from and to vacate, vary or alter, the judgment of the Court of Appeal dated 3rd December 2015. In this matter, the Court of Appeal by the said judgment reversed the order of the High Court dated 23rd March 2012.

9. Briefly, the facts in this case are as follows: The Plaintiff-Respondent-Petitioner (hereinafter referred to as the Petitioner) filed this action by way of a Writ of Summons seeking indemnity under the two insurance policies, it had with the Defendant-Petitioner-Respondent Company (herein after referred to as the Respondent). Having claimed indemnity under those two policies, Petitioner sought to have a judgment against the Respondent in a sum of $620,222.67 with interest, at the rate of 10% accumulated thereto. It had prayed for the costs of the action as well.

10. The said claim had been made consequent upon the damage caused to the stock and machinery belonging to the Petitioner Company (insured) that was insured with the Respondent Company (insurer). The immediate cause of the damage to the property was the rain water, logging into the building where the affected goods were placed. The rain referred to above had occurred in the month of January 2003 during Tropical Cyclone, named 'Cyclone Ami'.

11. Admittedly, the property in issue had been insured under the fire and perils policy bearing No.922625/1111/06913 and also by another consequential policy bearing No. 922625/1111/06915, covering the period 1st July 2002 to 1st July 2003. The principal fire policy bearing No.922625/1111/06913/2001 had been issued to cover the peril of fire and subsequently, upon payment of an additional premium, the cover had been extended to include storm and/or tempest but it specifically excluded "flood". It was further extended to include hurricane and water damage (due to burst pipes) as well. Admittedly, the insurance policy was to cover the damages caused by a cyclone, considering it as the peril but it specifically excluded damages due to floods. However the issue, basically in this instance is whether the cause of the peril was the flood or not.

12. Following is the clause, on the strength of which the Petitioner had submitted its claim. Exclusion clause too is found under the heading, special conditions.

> *"In consideration of the payment by the insured to the Company of an Additional Premium it is hereby agreed and declared that the insurance under this Policy shall subject to the Special Conditions hereinafter contained extend to include destruction of or damage to the Property insured caused by Storm and/Tempest."*
>
> *Special Conditions*
>
> *(a)...*
>
> *"(b) No claim will be admitted in respect of:*

(i) Loss or damage to the insured interest by water or rain, unless such loss or damage is caused by water or rain entering the building through openings in the walls or roof(s) made by Storm and / or Tempest.

(ii) Loss or damage cause by sea, tidal wave, high-water, flood, erosion, subsidence or landslide"

13. The Respondent declined to indemnify the Petitioner stating that the alleged damage had been caused due to the flood for which the liability of the insurer had been specifically excluded in terms of the special condition (b) (ii) referred to above.

Proceedings in the High Court

14. When the case was taken up for hearing in the High Court, parties invited Court to first consider a preliminary issue. It was to determine the cause of the peril. What took place in the High Court at that point of time is found in paragraph 2 of the judgment of that Court. It reads thus:

"At the hearing, the parties requested the court to hear as a preliminary issue the cause of the peril. The parties agreed that if the proximate cause is held to be cyclone Ami, then the matter would proceed to hearing on the other defences and quantum. If floods are found to be the proximate cause of the damage, the plaintiff's claim is to be dismissed with costs."

15. The exact preliminary issue that was raised is seen in paragraph 3 of the impugned judgment as well and it reads as follows:

"What was the proximate cause of the damage to the plaintiff's goods and equipment?"

16. At this stage, it is pertinent to mention that in view of rule 3 of the Order 3 in the High Court Rules 1988, the High Court is empowered to try such a preliminary issue though it contains large volume of facts as well. The said Rule stipulates thus:

> *"3. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and party of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated".*

17. Ordinarily, a preliminary issue is tried at the commencement of the hearing only when the Court is of the opinion that there is a possibility of disposing the entire case finally. It is done so, in order to minimise delay and for convenience and to curtail expenses and also to avoid duplicity. Though it is the discretion of the Court to try a preliminary issue which may contain even facts, it is always better to take up all the matters in dispute in one trial particularly when the issues of facts are involved. Of course, clear questions of law that help disposing the matter finally, are always being tried as preliminary issues.

18. In this regard, I wish to quote paragraph (483) from Halsbury's Laws of England (4th Edition).

> (3) TRIAL OF SEPERATE ISSUES
>
> ***483. Single Trial of all issues.*** *The characteristic mode of trial takes the form of one continuous episode in which all the matters in dispute between the parties will be completely and finally determined, and all multiplicity of legal proceedings with respect to any of these matters will be avoided. Accordingly, the beneficial object of the law that all disputes should be tried together should be the normal practice of the court, and therefore an order for the separate trial of separate issues should be regarded as a departure from the norm, and generally speaking such an order should only be made in exceptional circumstances or on special grounds. Whether such an order should be made depends upon convenience and the saving of expense. An*

order for the separate trial of a preliminary point of law is not appropriate where the facts are in dispute, or where there are too many variables to admit of a clear-cut solution in advance, and especially where the law itself is unsettled or obscure. The court will not decide academic or hypothetical questions nor future questions.

19. Having mentioned as to the manner in which preliminary issues are being framed and tried, I will now turn to consider the matter in issue at hand. Upon framing the aforesaid preliminary issue, High Court allowed the parties to call witnesses to give evidence. Accordingly, three witnesses gave evidence. They were Charan Singh, the Managing Director of the Petitioner Company, Ravind Kumar, a senior Scientific Officer of the Meteorological Service and Hemant Kumar Charan from the Hydrology Department. The Respondent opted not to call witnesses but in its written submissions it is stated that it would rely on the evidence of the plaintiff's witnesses. At the conclusion of the hearing both parties filed their respective submissions as well.

20. High Court having looked at the evidence as well as the relevant authorities, pronounced its decision on the preliminary issue on 23rd March 2012 with a subsequent correction made on the 29th March 2012.

21. The aforesaid decision of the learned High Court Judge was that the sole and proximate cause of the damage to the property in issue was Tropical Cyclone Ami. She then made order to fix the case for further hearing and decided to proceed with the matter on the other defences and liabilities. (vide the "order" at page 24 in the S C record)

Consideration of merits of the appeal by the Court of Appeal

22. Being aggrieved by the aforesaid decision of the High Court, Respondent filed an appeal to the Court of Appeal. The Court of Appeal having looked at the evidence and the law carefully held that for all practical purposes there exists no difference between the proximate cause and the immediate cause of the peril. (vide at Para. 39 of the C/A

judgment) They also have examined the need to consider the applicability of the *"contra preferentum"* rule which also had been considered by the High Court in coming to its findings.

23. Learned Judges in the Court of Appeal have concluded that the learned High Court Judge has misdirected herself on the evidence (facts) and the law relating to the *"proxima causa"*. They also have held that it is not necessary to apply the *"contra preferentum"* rule as there was no ambiguity in the terms and conditions of the contract of insurance. Finally, the Court of Appeal set aside the judgment of the High Court and allowed the appeal of the Respondent.

24. Significantly, no specific order as to the maintainability of the action had been made pursuant to the said findings of the Court of Appeal made on 3rd December 2015. It had only set aside the judgment of the High Court allowing the appeal despite the fact that the Respondent in its notice of appeal to the Court of Appeal has also moved to have the Petitioner's action dismissed in the event the appeal is allowed. Indeed, in the last line of paragraph 2 of the High Court judgment, it clearly states that; if floods are found to be the proximate cause of the damage, the plaintiff's claim is to be dismissed with costs.

25. As mentioned hereinbefore, the only issue before Court was to ascertain the proximate cause of the peril. It was on the request of the parties that this issue was brought in. Reason as to why such a cause of action, namely to try a preliminary issue which contains a large volume of facts, was taken had been basically to shorten the proceedings by obtaining an order for dismissal of the action in the event the preliminary issue is answered in favour of the Respondent. If not, the matter was to proceed further in the normal way which the learned High Court Judge seems to have correctly understood and in fact done.

Consideration of the merits of this appeal

26. It was the evidence of Charan Singh who submitted the claim that the water logging into the building was due to the water seeping through the gaps of the doors of the building where the damaged stocks and machinery were placed. Therefore, it is clear that the damage to the property had been the water level of the area where the building was situated had increased. No evidence was forthcoming to show that the water had come into the building through its doors or windows or even through any other opening of the building. There is not an iota of evidence to show that a slightest damage was caused to the building due to the rain or the blowing or as a result of the cyclone/storm/tempest whatever one names it. His evidence was that the building did not suffer any damage caused by wind in the cyclone and the roof and other fixtures of building were intact. (vide at Para. 10 in the judgment of the High Court)

Charan Jeet Singh in his answers to the questions from Court has stated thus:

> *"Supermarket Building is two storeys*
> *This building did not get damaged by cyclone*
> *All roofs etc was in fact*
> *My shop is near bus stand/market near the river"*

27. It is the experience of Fiji to have additional wooden/metal covers to cover the openings of buildings when a cyclone warning is issued, probably to prevent damage being caused by such an occurrence irrespective of there being an insurance cover or not. In this instance too, Charan Singh in his evidence has said that when the cyclone warning was issued they got prepared for it and made arrangements to put shutters etc and thereafter the supermarket was closed. (his evidence on 01.07.2011)

28. Against such a backdrop only, the Court will have to interpret the terms and conditions of the insurance agreement. By stating so, I am not for a moment thinking that the chain of causation of the event does not become material in deciding the cause of the peril. Undoubtedly, it was due to the rain that the water level of the river became higher. It

became so because of the high tidal waves and the water getting accumulated along the coast. (vide evidence of Ravind Kumar- PW 2) It is due to the said high water level that the water had seeped through the gaps of the doors of the building. Certainly, that rain was an integral part of Cyclone Ami.

29. Under such circumstances, what is the basis that is to be applied in determining the cause of the peril? **Lord Wright in Yorkshire Dale Steamship Company Limited Vs. Minister of War Transport [1942 AC 691 at page 706)** had stated thus:

> *"This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards. Causation to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it."*

30. At this stage, I prefer to make a small addition to the aforesaid theory evolved by Lord Wright by giving a wider meaning to the "man in the street" by adding that "the man in the street who is somewhat familiar or knowledgeable with the situations similar to the issues that are to be determined."

31. Having stated so, I also must mention that it would be necessary to refer to the manner in which the insured had acted in this instance though it may not directly help deciding the issue before Court. I believe it may be of some use for those who enter into insurance policies such as this. In this particular instance the insured being a person with long years of experience who has seen cyclones accompanied by wind and rain should have known at the time he obtained the cover that the insurance was only for the damages caused by a Cyclone and that he will not be indemnified for the damages caused by floods. He, being the Mayor of Labasa at the time, (vide his evidence recorded on 01.07.2011) was in a better position to understand the terms and conditions of the insurance agreement particularly the effect of the exclusion clause especially when rain is always attributed to a cyclone.

32. It is also pertinent to note that in the extended insurance policy by which hurricane and water damage due to burst pipes was included, a specific clause was put in to cover even the damage caused by water provided such an event should have been a result of bursts pipes. Therefore, it is clear that the parties were well aware as to the situations that cover damages caused by water; in this instance it had been named as floods. Hence, it is my opinion that the parties are not entitled to make a claim outside those areas specifically referred to in the agreement since the damage was due to water entering through the gaps of the doors into the building where the insured goods were placed.

33. On the other hand, if a person thinks that he would be indemnified even for the damages caused by floods by having an insurance policy to cover only Cyclone without having obtained a cover for floods, then is there a purpose of excluding floods in a cover for Cyclone. My answer is no. Unless a valid material link, between the cyclone and the floods is established.

34. Accordingly, it is now necessary to ascertain whether or not the Petitioner in this instance has established the link between the Cyclone and the floods. As mentioned hereinbefore, water had seeped through the gaps of the doors only. Not a drizzle has gone into the building through any other opening found at a higher level above the ground level. Therefore, the damage is certainly due to the water level on the ground becoming higher. No damage whatsoever had been caused to the building. Indeed, precautionary measures had been taken by the Petitioner to protect the building after the Cyclone warning was issued.

35. Against such a background, I am unable to see a link between the Cyclone and the water level going up even though the Cyclone could have generated rain as a result of which the water level in the area where the affected building was situated.

36. In the circumstances, the test of the "common man in the street" and also the chain of causation of the particular incident have to be decided in favour of the Respondent.

Accordingly, I am of the opinion that the proximate cause of the peril had been the floods and not the Cyclone Ami. Therefore, the Respondent is entitled to claim the benefit of the exclusion clause. Petitioner is not entitled to claim indemnity under and in terms of the insurance policy put in suit.

37. I have also looked at McGillivray on Insurance Law by Sweet and Maxwell (Fifth Edition). In that book it is stated that terms and conditions similar to the policy in question are frequently found in insurance policies in the United States. It may probably due to the cyclones that they experience often. In paragraph 2020 in that book it is stated as follows:

> ***"4-POLICIES COVERING RISK OF STORM AND TEMPEST***
>
> ***Risks covered by...****Thus, a windstorm policy covers both direct damage by wind and damage caused by rain entering through openings in the roof made by wind. Where the structure had been weakened by precedent rain, but the wind was the efficient cause of the damage, it was covered, and similarly where the structure was weakened by the wind, although the ultimate collapse was precipitated by weight of snow. Many such policies contain an express exclusion of damage by water; where this is the case, damage by the combined effect of wind and water,* ***the water being either the predominant cause or a substantial contributing factor, is not covered.*** *But even where damage by floodwater was excluded, the whole damage was recoverable where goods had been blown by the wind into a flooded street and were found broken and waterlogged.(emphasis added)"*

38. In the circumstances, having considered the facts and the law relevant to the issue at hand, I do not see that this appeal contains the threshold requirement referred to in Section 7(3) of the supreme Court Act 1998 by which the petitioner is required to establish the existence of a far reaching question of law, a matter of great general or public importance, a matter that is otherwise of substantial general interest to the administration of civil justice, for the Petitioner to have special leave of this Court in order to consider further merits of the appeal. Accordingly, special leave to appeal cannot be granted.

The Orders of the Court are:

1. Special Leave to appeal from the Judgment of the Court of Appeal dated 3rd December 2015 is refused.

2. Judgment dated 03rd December 2015 of the Court of Appeal is affirmed.

3. In view of this decision and also upon considering the matters referred to in paragraph 2 of the High Court judgment dated 23rd March 2012, the action of the Petitioner filed in the High Court is dismissed.

4. The Petitioner to pay $5000.00 as costs of this appeal.

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Hon. Mr. Justice Suresh Chandra
Justice of the Supreme Court

SUPREME COURT OF FIJI
FIJI

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