

**BETWEEN: Bradley Enterprises Ltd T/A Sandalwood
Apartments**

Claimant

**AND: Capital Insurance Limited formerly known
as Dominion Insurance Limited**

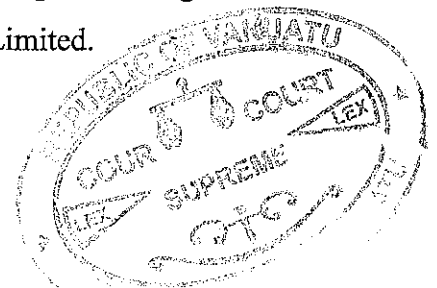
Defendant

Date of Hearing: 30th March 2021
Date of Judgment: 29th July 2021
Before: Justice Oliver.A.Saksak
In Attendance: Mr Mark Hurley for the Claimant
Mr Nigel Morrison for the Defendant

JUDGMENT

Introduction

1. This is a claim made pursuant to an Insurance Policy Cover No. 6714-2 (the Policy).
2. The contract of insurance existed between the claimant as insured and the defendant as the insurer in March 2015. It was a term of the Policy that the defendant would indemnify the claimant for accidental loss or damage caused by a cyclone to buildings and infrastructure at the claimant's business premises known as Sandalwood Apartments, situated at the Lagoon Area, Ellouk Road, Port Vila.
3. On 13 March 2015 Cyclone Pam caused substantial damage to the claimant's business apartments.
4. The defendant paid for the damage to the furniture and other non-fixed contents of the claimant's business premises by a cash payment but elected to indemnify the claimant for the damage to the buildings and infrastructure by repairing the damage. For that the purpose the defendant employed Bramly Constructions Limited.



5. The claimant provided an initial estimate from Bramley Constructions at VT 83, 161,221 on 8th April 2015.
6. The estimate was however revised and reduced to VT 77,451,621 . The amount of estimate was accepted by the defendant.
7. In about May 2015 the defendant commenced repair works on the claimant's business premises. The sum of VT 77,451,621 was paid to Bramley Constructions. The defendant also deducted VT 4,500.546 being for emergency repairs paid by them in cash.
8. However by 12 August 2016 repair works had not been completed. By letter dated 22 August 2016 the defendant had refused to continue with the repairs and repudiated its obligation to indemnify the claimant.

The claim

9. The claimant claims the defendant is in breach of its obligation under the Policy to indemnify them for repair works still not yet carried out. These are particularised in the Amended claim dated 28 June 2018-

(a) Reinforced concrete footings to anchor facades	VT 400,000
(b) Exterior reinforced concrete blocks wall facades	VT2,062,725
(c) Plumbing	VT1,180,000
(d) Gas Fitter	VT 1,600,000
(e) Kitchen, Bedroom, Bathroom, Laundry Joinery and Interior Doors	VT 14,534,775
(f) Interior, Plasterboard ceilings, Bulkheads-	VT2,534,775
(g) Painting Finishes	VT 700,000,
	VT 10,340,800
(h) Insulation	VT 304,000
(J) Preliminaries	VT 5,785,420
Subtotal forward projections	VT 30,939,420
VAT	VT 3,867,427
Total	VT 34,806,847



10. In addition, the claimant claims VT 4,500,546 which the defendant paid for emergency works in an attempt to mitigate the losses under the Policy.

11. The total claim of the claimant is VT 39,307,393.

Defence

12. The defendant denies any liability. They say they have paid VT 4,500,546 and VT 77,451,621 in accordance with the Policy and are concerned and wary of any double payments.

13. The defendant further says in its defence that it had never agreed to vary the insurance contract to accommodate these additional or provisional costs.

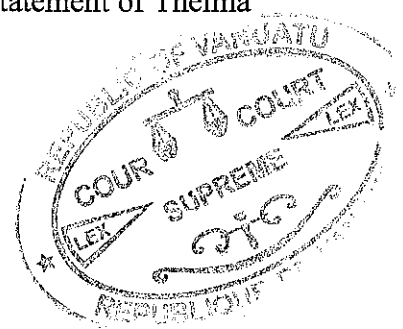
14. The defendant submitted that any overrun amounts claimed by the claimant added up to VT 22,016,865 which, if deducted from VT 39,307,393 would reduce it down to VT 17,291,000 which the claimant could be entitled to. But even this amount is opposed by the defendant. And even if VT 4,500,546 was excluded or deducted from 17,291,000 leaving the balance of VT 12,790,454 , the amount was still opposed by the defendant.

15. Finally the defendant submitted they was a falling out between Bramley and Wheatley, who were effectively claimant and builder, resulting in the defendant keeping a tight rein on the costs to ensure the claimant did not enhance his own buildings at the potential expense of the defendant insurer.

Evidence

16. The claimant relied on the evidence by sworn statements of Nicolas Henry Bramley dated 16th April 2020 and 25 August 2020 and of Nathaniel Bue dated 26th August 2020 in support of its claims.

17. The defendant on the other hand relied on the evidence by sworn statement of Thelma Tapassei filed on 10th July 2020 in support of its defence.



Discussion

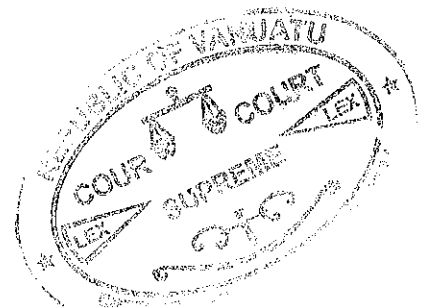
18. The parties have not specifically identified any issues for determination by the Court. From the pleadings, evidence and submissions it appears to me that the issue does not involve the construction or interpretation of the Insurance Policy or contract, but rather the main issue is how much the claimant should be indemnified over and above what has already been paid.
19. The defendant argued that (a) the claimants have been paid in full and should not be entitled to anymore, (b) that there has been a split between Bramley and Wheatly creating a risk that, the claimant as both builders and owners of the business premises could be enhancing his own building at the expense of the insurer, and (c) that the defendant never agreed to vary the insurance contract to accommodate the additional or provisional costs. These appear to me to be the side issues. I deal with them in the paragraphs that follow.

The Split

20. From the evidence it was a reality, however the defendant could not possibly use it as a defence to escape their liability as insurers. They had accepted Bramley Construction for the repair works instead of David Construction, and must therefore live with the consequences of their choice.

The payments

21. The payments of VT 77, 451,621 was acknowledged as the revised estimate provided by Bramley Constructions. They did not include provisional costs. The initial estimate was for VT 83,161,221. This amount was reduced by VT 5,706,600. It was an unreasonable deduction in my view taking into account the fact that the insured sum under the Policy for the building alone was VT 148,000,000. Deducting VT 77,451,621 from VT 148,000,000 the sum of VT 77 548,319 is the balance remaining. Speaking in percentage, it appears to me that the latter figures represent about 54% that remains unpaid.



22. In the McLarens First Report dated 13 April 2015 written by Gavin Mc Curley, Senior Loss Adjuster found in Annexure A to the statement of Thelma Tapasei at pages 4-6 Mr Mc Curley under the Head “ UNDERINSURANCE” said:

“ we would recommend that valuers be appointed as we consider that the buildings are under insured. We await your instructions to engage the valuer. As well we consider the contents to be under insured.”

The Building and contents are described on page 2 of the report.

There was no evidence from Mrs Tapasei or the defendant that a valuer was appointed to address the issue of under insurance raised by the Senior Loss Adjuster.

23. The Second Report was dated 22nd April 2015 written by Jeff Wiltshire to the Insurer. This is found at page 13 of Mrs Tapasei’s Annexure A. Mr Wiltshire made the following remarks (page 14):

“ We await the valuation for the Sandalwood Apartment complex before being in a position to outline our recommendation with regard to potential further settlement. In the meantime we look forward to receiving your instructions in relation to:

- *The interim payment following emergency works*
- *Confirmation of detail of “ other property”.*

We look forward to hearing from you”

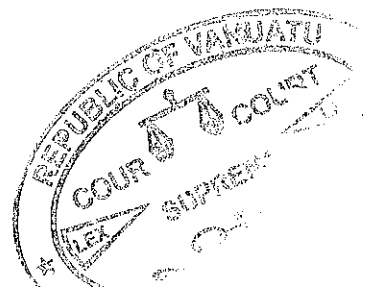
There is no evidence of any response to this report.

24. Mr Wiltshire wrote a letter on 25 May 2015 for McLarens to Sandalwood Apartments as annexure NHB 2 pages 13 and 14. At the end of letter Mc Larens said:

“ following the initial progress payment, we are prepared to recommend further progress payments as required. Please note the quotation of Bramley Constructions does not include items for which a provisional costs has been provided and it may prove necessary to review find costs upon completion of those areas of works.”

(my emphasis)

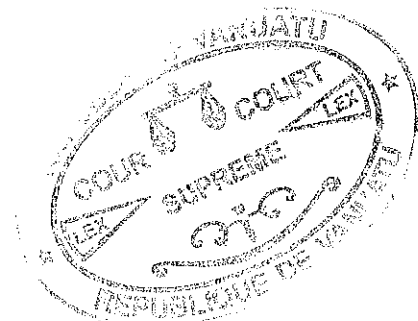
25. Bramley Constructions quoted that passage in their letter dated 13 July 2016 and set out its increases and identified its Forward Projections of Rectified Works yet to be undertaken totaling VT 34,806,847, being the amount they are currently claiming.



26. The issue then is whether these are reasonable, valid and lawful claims under the Policy? The answer is in light of the evidence in the affirmative.
27. Finally the letter by Ridgway Blake Lawyers dated 22 August 2016 confirms the defendant “ *has further moneys to pay the claim which remains in trust.*” The only reason they will not be released is due to the continuing dispute between the directors.
28. It has been some 5 years ago since that letter was written. There has been a split and the directors have gone their separate ways. That has not changed the position that the repair and restoration works have not been completed.
29. Mr Nathaniel Bue’s evidence, although shows completed works, it is obvious Item 9: Interior Plaster Board Ceilings, and Bulkhead were only 95% completed. Under Item 13: Kitchen, Bedroom, Laundry Joinery & Interior Doors show some PC sums with orders placed with expected over-runs.
30. In all probability the claimants have established they are entitled to be indemnified for additional or provisional costs.
31. I assess the claimants claims to be VT 32,364,122 rather than VT 34,806,847 as claimed. I have disallowed the claims for Reinforced Concrete Footings and Exterior Reinforced Concrete Block Wall facades (paragraph 9 (a) and (b). These should be the responsibility of the business owner and not the liability of the Insurer.

The claim for VT 4,500,546

32. These are disallowed. The payment of this amount by the defendant for the emergency works under the Policy was unjustified. The claimant cannot claim to be indemnified for this amount.
33. The total amount is therefore VT 32,364,122 due and payable by the defendant to the claimant.



34. Finally the claim by the defendant that no variation was made to the Policy to entitle the claimant to further payments. This argument is rejected. There were sufficient representations made by McLaren as shown by evidence previously discussed creating a legitimate expectation that provisional sums or costs of overruns were adequately covered by the Policy. No amendments or variation was therefore necessary.
35. For those reasons I enter judgment in favour of the claimant for the total sum of VT 32, 364,122 against the defendant.
36. I award interest at 5% per annum on VT 32, 364, 122 from the date of filing of the Amended claim being 28 June 2018 to the date of settlement.
37. I reserve the issue of costs pending submissions by Counsel.

**DATED at Port Vila this 29th day of July 2021
BY THE COURT**


OLIVER.A.SAKSAK
Judge

