IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0090 OF2004S
(High Court Civil Action No. 0355 of 1998L)

BETWEEN: **FAI INSURANCE (FIJI) LIMITED**

Appellant

AND: **PRASAD'S NATIONWIDE TRANSPORT EXPRESS COURIER LIMITED**

Respondent

Coram: **Pathik, JA**
Hickie, JA
Powell, JA

Hearing: **Monday, 14 April 2008, Suva**

Counsel: **F Haniff for the Appellant**
V Mishra for the Respondent

Date of Judgment: **Wednesday, 16 April 2008, Suva**

JUDGMENT OF THE COURT

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[1] This is an appeal from a decision of Byrne J of 4 November 2004 in which the appellant was ordered to pay the respondent damages in the sum of $220,597.00 plus costs which he fixed at $3,000.00 .

[2] In November 1997 the respondent insured an Isuzu truck with the appellant for a period of 12 months. The vehicle and accessories, which relevantly included a

canopy, was insured for the sum of $58,000 with an excess of $2,000. The insurance policy ("the Policy") named the Fiji Development Bank ("the Bank"), which financed the purchase of the vehicle, as an Interested Party.

[3] The Bank was the lessor of the vehicle at all material times.

[4] The vehicle had been purchased in 1995 for $72,900, which included $59,772 for the vehicle and $6,500 for its canopy and an amount for VAT. The respondent received a $20,000 trade-in on another vehicle and borrowed the balance of $52,900 from the Bank.

[5] The respondent had a contract with the Government of Fiji for the cartage of government goods and supplies and the personal effects of employees being transferred to various places within Fiji.

[6] In December 1997 the vehicle was extensively damaged in an accident caused by an employee of the respondent. The respondent made a claim on the Policy.

[7] The appellant engaged a firm of assessors, S.K. Jit & Associates of Suva, to assess the damage to the truck. After much delay, in about March 1998, Mr Jit requested the respondent to take the vehicle to Asco Motors in Suva for inspection. However Mr Jit was not there and the respondent was told to take the vehicle back to Lautoka. About two months later, on 12 May 1998, Mr Jit asked the respondent to take the vehicle to Asco Motors in Nadi.

[8] The vehicle remained at Asco Motors in Nadi for another six months when it was seized by the Fiji Development Bank for arrears in payment of loan instalments. $40,000 had been paid off the loan when the truck was re-possessed, the outstanding balance being it would seem about $13,000.

[9] The respondent claimed that the vehicle was not properly repaired. Second-hand parts were used on a vehicle that was practically new and the chassis was not properly re-aligned or repaired so that it was unfit for use for carrying heavy items and long distance travel. Moreover the appellant denied the Policy included the canopy or the cost of delivery to Asco Motors.

[10] The respondent's case was that the appellant had failed to comply with its obligations under the Policy, namely to repair or re-instate the vehicle in a satisfactory state within a reasonable time. It had received no payment from the appellant and it had suffered loss and damage as a result of this contractual breach.

[11] The respondent's evidence was that to fulfil its contractual obligations with the Government of Fiji it was obliged to hire vehicles during an 18 month period following the accident at a cost of $5,280 per month, a total of $102,960.

[12] The trial judge found for the respondent and awarded damages and interest as follows:

1.	(a) Loss of money paid for vehicle	$40,000
	(b) Loss of trade-in	$20,000
	(c) Less compulsory excess	$2,000
		$58,000
2.	Costs of moving the vehicle to repair yards	$1,245
3.	Cost of hiring alternative vehicle for 18 months	$102,960
		$162,205
4.	Interest from writ (2 December 1998) to Judgment at 6%	$58,392
		$220,597

[13] On 17 December 2004 the appellant filed a Notice of Appeal and in February 2005 execution of the judgment was stayed pending determination of the appeal.

[14] In its Notice of Appeal the appellant raises 7 grounds, namely that the trial judge erred:

[15] In finding any breach of the Policy by the appellant

[16] In awarding $58,000 as damages for loss of the vehicle when there was no evidence that the respondent as lessee had sustained a loss of that amount

[17] In awarding $102,960 as consequential loss when such losses were excluded by clause 2.2 of the Policy and where there was no evidence that the respondent was deprived of the use of the vehicle

[18] In disregarding and/or misconstruing the terms of the Policy by awarding damages for losses not covered by its terms

[19] In holding that it was necessary for the appellant to bring to the attention of the respondent the Exclusion clauses of the Policy

[20] In purporting to apply the "*contra proferentum*" rule when it had not application to the circumstances

[21] In awarding damages for losses suffered as a result of delay in payment of the claim when there was no express or implied term of the Policy to meet such losses.

Ground 1 - Finding any breach of the Policy by the appellant

[22] There is some discussion in the judgment about deceptive conduct by the appellant and of the constitutional validity of the *Fair Trading Decree* of 1992 but it is clear enough that damages were awarded for breach of the terms of the contract of insurance, and that is how the matter needed to be approached.

[23] As the appellant acknowledges in its written submissions, the respondent's case was that the appellant was under a duty of care to repair the damage within a reasonable

time, which it alleged the appellant failed to do so. The respondent says that the appellant, in failing to file an Amended Defence in the proceedings below, is taken to have admitted such a breach of contract. In any event counsel for the appellant properly concedes that if the appellant had such a duty then on the evidence such a duty was breached.

[24] Clause 2.1(a) of the Policy gave the appellant the option *"to repair, reinstate or replace"* the vehicle or *"to pay the monetary value of the loss or damage to your vehicle provided payment does not exceed the current Market Value or sum insured .. whichever is the less, of your vehicle at the time of loss or damage."*

[25] There is no express term in the Policy that provides that where a claim is properly made the insurer must perform its obligations of repair, replacement or payment within a reasonable time.

[26] For a term to be implied (1) it must be reasonable and equitable (2) it must be necessary to give business efficacy to the contract (3) it must be so obvious "it goes without saying" (4) it must be capable of clear expressions and (5) it must not contradict any express term of the contract: ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** (1977) 180 CLR 266 at 282-3

[27] The appellant says that a term should not be implied because there is binding authority to the effect that there can be no damages for breach of such a term. In other words there is no business efficacy in implying a term if there is no remedy for its breach.

[28] The question of whether or not there is a remedy, and a discussion of the authorities relied upon by the appellant, are dealt with under Ground 7 below where this Court finds that damages can be awarded for such a breach.

[29] If an insurer could delay repairing or replacing a damaged vehicle indefinitely its obligations under the Policy would have no value.

[30] A term requiring the appellant to perform its obligations under clause 2.1(a) of the Policy within a reasonable time satisfies the five tests in BP Refinery (Westernport) and must be implied.

[31] In this case nearly 12 months after the accident the appellant had still not repaired or re-instated the vehicle or paid the respondent money for it, at which point it was seized by the Bank. Moreover it was not until 6 months after the accident that the appellant took effective steps to have the vehicle assessed. Having the vehicle assessed is an essential first step in the performance of the appellant's obligation under clause 2.1(a) of the Policy.

[32] In this Court's opinion the conclusion that the appellant did not repair or re-instate the vehicle within a reasonable time, or even begin to do so, is inescapable. Moreover the trial judge found that the appellant paid no moneys to the respondent but had maintained that it had done so *"in a deliberate attempt to delay"* settlement of the respondent's claim. This is a finding of fact that cannot be challenged in this Court.

[33] We note that at the hearing the appellant called only one witness, namely an insurance officer who was not employed by the appellant at the time of the accident and who could throw no light on the whereabouts of Mr Jit.

[34] Ground 1 of the appeal fails.

Ground 2 - There was no evidence that the respondent as lessee had sustained a loss of $58,000

[35] The respondent was the insured and had an insurable interest in the vehicle. The interest of the Bank, which part financed the Policy, was recorded on the Policy.

[36] The trial judge found that the invoice from Asco Motors specifically mentions the canopy as being part of the vehicle and that the appellant knew this when it accepted the premium for the vehicle. The trial judge rejected the appellant's contention that the canopy was not covered by the Policy because it was not classified as an"*accessory*". This Court finds no error in the trial judge's reasoning on this point.

[37] The correct measure of loss in respect of the vehicle is the value of the vehicle at the time of accident. In the absence of evidence to the contrary, that is $58,000. The respondent never saw the vehicle again and in the circumstances it must be treated as if the appellant exercised its right to pay the respondent the sum insured and keep the vehicle for itself.

[38] Furthermore the appellant, if it wished to take the point that the vehicle at the time of the accident had a value less than $58,000, was in a better position than the respondent to call such evidence. However its loss assessor, Mr Jit, who had seen the vehicle, failed to give evidence on this or any other matter. The Court is entitled to assume that any evidence that Mr Jit could have given would not have assisted the appellant: ***Jones v Dunkel*** (1959) 101 CLR 298

[39] At the hearing of this appeal counsel for the appellant properly conceded that the vehicle must be assumed to have had a value of $58,000 at the time of the accident.

[40] From the $58,000 must be deducted the $2,000 excess.

[41] If the Bank subsequently sold the vehicle and as a result of that sale did not pursue the respondent for the moneys owed to it (about $13,000) or some part of that amount, then the respondent's loss is reduced by that amount. This must be so, otherwise the respondent would receive a windfall. Moreover if the Bank realised

more than was owing to the respondent and accounted to the respondent for such excess, that must also be deducted.

[42] The approach taken by the trial judge in arriving at $58,000 was not a valid one. The figure must be $56,000 less any benefit the respondent has received in the form of reduction in its loan from the Bank or payment from the Bank.

[43] There is in the Court Record evidence of the fate of the vehicle after it was seized by the Bank, namely a letter from the Bank to the respondent dated 24 October 2002. In that letter the Bank confirms that it paid Asco Motors $1,815 to have the vehicle released, that the vehicle was finally sold by the Bank for $30,000 and that *"the residual balance on account is $43,336 as at 30/09/02"*.

[44] This letter was not considered at the hearing because damages for loss of the vehicle was not approached in this way.

[45] The respondent says that the failure by the appellant to address quantum below means that the trial judge's assessment of damages cannot be challenged on appeal. Moreover the respondent says that the fact that it did not receive any of the $30,000 proceeds of sale from the Bank means that no part of the proceeds of sale has to be deducted from its damages. Both of these submissions are rejected.

[46] The trial judge has an obligation to assess damages in accordance with principle and if she or he is without assistance from the parties the judge must do the best he or she can on the evidence before the Court. Although the general principle is that parties are bound by the way they conduct their proceedings and are consequently disallowed from raising new matters on appeal: ***Coulton v Holcombe*** (1986) 162 CLR 1; an appeal court has a discretion to allow new points of law to be raised and ought to do so when the alleged error of law relates to a point that is unanswerable: ***Hampton Court Ltd v Crooks*** [1957] 97 CLR 367.

[47] In these proceedings the trial judge appears to have adopted in their entirety the respondent's submissions in relation to compilation of damages (except for the interest rate which he reduced from 10% to 6%) both in relation to the vehicle and the consequential loss, and therefore if there has been an error he has been led into it by the respondent. There has been an error of legal approach and it is an error that this Court can and should correct.

[48] As to the second of the respondent's arguments, the size of the respondent's loan account with the Bank is irrelevant. The proceeds of sale of the vehicle that were applied for the respondent's benefit must be accounted for.

[49] The Bank sold the vehicle for $30,000. It cost the Bank $1,815 to obtain the release of the vehicle from the car yard. There is no evidence as to the Bank's other costs of selling the vehicle but the Court will assume they amounted to a few thousand dollars and accordingly settle on a net benefit to the respondent from the sale of $25,000.

[50] The figure of $58,000 found by the trial judge must be reduced to $56,000 for the policy excess, and is further reduced by $25,000 to $31,000.

[51] Ground 2 of the appeal succeeds in part.

Ground 3 - Awarding $102,960 as consequential loss when such losses were excluded by clause 2.2 of the Policy and where there was no evidence that the respondent was deprived of the use of the vehicle

Ground 5 - Holding that it was necessary for the appellant to bring to the attention of the respondent the Exclusion clauses of the Policy

Ground 6 - In purporting to apply the "contra preferentum" rule when it had no application to the circumstances

[52] There was ample evidence that the respondent was deprived of the use of the vehicle for a period of nearly twelve months at which time it was seized by the Bank from the appellant's repairers, thus permanently depriving the respondent of the vehicle. The factual gloss that forms part of Ground 3 is not made out by the appellant.

[53] However the real issue raised by Grounds 3, 5 & 6 is whether the trial judge erred in awarding damages for loss of use of the vehicle in the face of clause 2.2(a) and (i) of the Policy.

[54] Clause 2.2 of the Policy provides that the appellant will not pay for *(a) Loss of use of your vehicle* or *(i) loss of earnings or other consequential loss while you do not have the use of your vehicle.*

[55] Following the accident the appellant exercised its right under clause 2.1(a) of the Policy to repair or reinstate the vehicle.

[56] The trial judge dealt with the exclusion clause by finding that the *contra proferentem* rule of construction means that a party claiming to rely on an exclusion clause must satisfy the court that it was brought to the notice of the insured.

[57] The trial judge found that the exclusion clause that the appellant sought to invoke was not brought to the notice of the insured and that the respondent was entitled to consequential loss of use of the vehicle.

[58] The *contra preferentum* rule only has application when a clause or provision in a document is truly ambiguous, in which case the interpretation which is against the interests of the party who proferred the document. In other words, against the interest of the party who drafted or presented the document to the other party, the other party having no input into the drafting or revising of the provision.

[59] It is a rule of construction by which an exclusion clause is construed against the party for whose benefit it is intended to operate: ***McRae v Commonwealth Disposals Commission*** [1951] 84 CLR 377.

[60] The rule, as Kirby J says in ***McCann v Switzerland Insurance Australia Ltd & Ors*** [2000] 203 CLR 579, is now generally regarded as one of last resort.

[61] It is true that an exclusion clause is *"ordinarily construed strictly against the proferens"*: ***Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd*** (1966) 115 CLR 353 at 376.

[62] However in this case there is no room for application of the *contra proferentem* rule because there is nothing ambiguous about the words of clause 2.2 of the Policy.

[63] The trial judge erred in holding that ***National Marketing Authority v Ram Padarath*** Civil Appeal CBV 0001 of 1992 was authority for the proposition that an insurer is obliged to bring exclusion clauses to the attention of the insured.

[64] There is no general obligation on an insurer to bring clauses such as clause 2.2 to the attention of the insured, at least where the intending insured is not suffering from any disability or inequality of bargaining power. Nor is this a case where the insured was misled by the insurer as to the existence or meaning of clause 2.2

[65] It follows that Grounds 5 and 6 of this appeal are made out. It does not, however, follow that the trial judge erred in awarding damages for loss of use of the vehicle.

[66] An exclusion clause can be one of three types. The first type operates to exclude rights a party would otherwise possess under a contract by reason of the other terms of the contract, or a rule of law. The second type restricts the rights of one party

without necessarily excluding the liability of the other. The third type qualifies the rights of a party by subjecting them to specified procedures.

[67] Clause 2.2 of the Policy is of the second type. It sets out items that cannot be claimed pursuant to the Policy. It does not prevent the insured from claiming damages for such items where there has been a breach of the Policy.

[68] This is how clause 2.2 operates. If the appellant had repaired the vehicle within a reasonable time then the respondent could not claim for loss of use the vehicle within that time. However when, as in this case, the appellant breaches its duty to the respondent by failing to repair or replace the vehicle within a reasonable time, the respondent is entitled to sue for damages for that breach of that duty, and those damages may include damages for loss of use of the vehicle.

[69] Clause 2.2 does not say that the insured is prevented from making such a claim for damages for breach of contract or in tort.

[70] Counsel for the appellant disagrees with this construction and contends that clause 2.2 should be read as being an exclusion clause of the first type, one that excludes the insured from making such a claim even for breach of contract or in tort.

[71] Any clause purporting to have the construction that the appellant contends for clause 2.2 would need to be in clear and unambiguous terms, and if there was any ambiguity the *contra proferentem* rule would come into play: ***Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd*** (supra).

[72] In summary the Court finds that the appellant is not prevented from relying on clause 2.2 of the Policy but that clause, properly construed, has no application where the claim against it arises out of its failure to repair or replace the vehicle within a reasonable time.

[73] Accordingly the appellant succeeds on Grounds 5 & 6 but fails on Ground 3.

Ground 7 - Awarding damages for losses suffered as a result of delay in payment of the claim when there was no express or implied term of the Policy to meet such losses.

[74] The Court is of the view that once the trial judge found that the appellant was in breach of its contract by failing to repair or replace the vehicle within a reasonable time, he was entitled to award damages on ordinary common law principles.

[75] It seems to the Court that the loss that the respondent claimed flowed from the breach, namely having to hire a replacement vehicle, was entirely foreseeable. The only question is, for what period should such hiring costs have been allowed.

[76] Logically the period would commence at breach (the time beyond which it was reasonable for the appellant to take steps to repair, reinstate or replace the vehicle or to pay the respondent the vehicle's value) and continue until it was clear that the appellant was not going to repair, replace or pay the value of the vehicle.

[77] The problem for the trial judge, and for this Court, is that the appellant did not put submissions on the proper calculation of any damages in the court below and this period was not clearly identified on the evidence. The appellant contented itself with arguing that for various reasons, principally clause 2.2 of the Policy, no damages for consequential loss were assessable.

[78] The respondent in its written submissions to this Court says that the failure by the appellant to address quantum below means that the trial judge's assessment of damages cannot be challenged on appeal.

[79] The appellant says that because the precise time of breach was not identified by the trial judge this Court cannot make a finding as to when that was.

[80] The Court disagrees with both the respondent and the appellant on this issue. The trial judge has an obligation to assess damages in accordance with principle and if she or he is without assistance from the parties the judge must do the best he or she can on the evidence presented. On the evidence in this case the trial judge would be in no better position than this Court to fix a time when the breach first occurred.

[81] This Court must therefore apply its mind to the evidence that was before the trial judge and it appears from that evidence that:

- On 12 May 1998 the Loss Assessor Mr Jit in a fax to the respondent copied to the appellant [167] instructed the respondent to make arrangements to have the vehicle taken to Asco Motors (Nadi) for repairs;
- On 21 September 1998 the respondent's solicitors wrote to the appellant complaining that the appellant had instructed Asco Motors not to repair the canopy;
- On 20 November 2000, following service of the Statement of Claim, the appellant's then solicitors, Vijay Naidu & Associates, in a letter to the respondent's solicitors alleged that the appellant *"had never instructed repairs to be undertaken by Asco Motors or anyone else"*;
- On 4 April 2001 the appellant's solicitors in a letter to the respondent's solicitors said that they had been instructed that *"there has been a payment made to your client in the sum of $10,320 by our client"*;
- On 26 April 2001 the respondent's solicitors wrote to the appellant's solicitors stating that *"Your client should be well aware"* that the $10,320 was in respect of a claim for another vehicle. On 18 May 2001 the respondent's solicitors furnished documentary evidence to the appellant's solicitors establishing that the $10,320 had no relation to the claim in these proceedings;
- In October 2002 the appellant's solicitors were persisting with the argument that the $10,320 was in settlement of the claim in these proceedings. By

letter of 17 October 2002 the respondent's solicitors again disabused them of this notion;

- At the hearing before the trial judge, which commenced on 28 October 2002 and continued in May and June 2003 and September and October 2004, the appellant maintained that it had paid $10,320 in settlement of the claim.

[82] The trial judge found, however, not only that no such payment had been made but that the appellant *"knew all along that it had not paid any money to the plaintiff in respect of the vehicle .. and that this was a deliberate attempt to delay the settlement of the (respondent's) claim or carelessness by (the appellant) which I find inexcusable in the circumstances."*

[83] It seems to this Court that the appellant, by failing to have the vehicle assessed within at least a month of the accident, was by that time in breach of its implied obligation to repair or replace or reinstate or pay moneys in respect of the vehicle within a reasonable time.

[84] The Court also considers that it would be unreasonable to have expected the respondent to have considered that its claim to have the vehicle repaired or replaced had been rejected, at least until mid-2001, and probably not until the hearing commenced in October 2002, because the appellant was maintaining the fiction that it had paid out the respondent's claim under the Policy.

[85] Accordingly there is no demonstrable error in the trial judge's award of damages for loss of the use of the vehicle for an 18 month period, or indeed an even longer period if damages had been claimed for such longer period. However the first month of the 18 month period claimed, being the month following the accident, ought not to have been allowed because during that month the appellant was not in breach of its contract.

[86] As stated in paragraph 27 above, the appellant contends that there is binding authority to the effect that there can be no damages for breach of a term that an insurer will perform its obligations under a policy within a reasonable time.

[87] The appellant refers the Court to ***President of India v Lips Maritime Corporation*** [1988] 1 AC 395 at 424, ***Apostolos Konstantine Ventouris v Trevor Rex Mountain (The "Italia Express" No. 2*** [1992] 2 Lloyd's Rep 281, ***Sprung v Royal Insurance (UK) Ltd*** [1999] Lloyd's Rep IR 111 and ***Normanhurst Ltd & Ors v Dornoch & Ors*** [2004] 1 Lloyd's Rep IR 27.

[88] The first of those cases is authority for the proposition that a claim for demurrage sounds in damages, not debt, and that there is no such thing as a cause of action in damages for late payment of damages. *"The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute."* ***President of India v Lips Maritime*** (supra) at 425. In this case a dispute as to the period for which demurrage was payable by the insurer was referred to arbitration.

[89] In ***Apostolos Konstantine Ventouris v Trevor Rex Mountain (The "Italia Express" No. 2*** (supra) the plaintiff's vessel was sunk while undergoing repairs and the insurer denied liability.

[90] In ***Sprung v Royal Insurance (UK) Ltd*** (supra) the plaintiff's premises were burgled and its machinery wrecked. During the next five weeks the insurer's representatives visited the premises on at least two occasions. Within a month of the damage the insurers paid the plaintiff £3,500 for damage to a weighbridge. There was however only a cursory inspection of more extensive damage to the premises. However on each occasion of the visit the defendant's representatives informed the plaintiff that he was not covered for those losses which they classified as *"wilful damage"*.

[91] The fourth case, ***Normanhurst Ltd v Dornoch*** (supra), involved a claim under a fire insurance policy. The insurers purported to avoid he policy for non-disclosure, the insured brought an action on the policy and sought additional damages for consequential losses which flowed from the defendant's failure to pay. The question before His Honour Judge Chambers QC was whether the insured was entitled to recover as damages for breach of contract consequential losses from an insurer's failure or refusal to pay a valid claim. The learned trial judge found against the insured on the authority of the three earlier cases cited.

[92] The English decisions are authority in cases where the insurer declines indemnity or full indemnity within a reasonable time. In none of the cases were the insurers in breach of a duty to consider or assess the claims within a reasonable time. In each of the cases the insured knew within a reasonable time either that the claim had been declined or partly declined.

[93] These distinctions have a clear legal basis. An insurer is not automatically in breach of its obligations when it declines indemnity under a policy. That is for a court or arbitrator to decide and it would be unreasonable for an insurer to run the risk of consequential damages from the point of refusal of indemnity until determination by the court or arbitrator. When indemnity is declined, in part or in full, the insured can organise its business or affairs with some degree of certainty.

[94] At the point the claim is refused it sounds in damages, with those damages to be quantified when a court or arbitrator determines whether or not the claim was validly refused in full or in part and thus whether there was a breach at all when the claim was refused.

[95] In the present case, the insurer is in breach of its preliminary duty to assess the claim and determine the extent, if any, to which it will indemnify the insured. At the time beyond which it is reasonable to assess or determine a claim, the insurer is

in breach of duty, and all that remains for the court is to assess whether any damages flow from that breach.

[96] In this situation damages do not sound at the time of breach because it is impossible to quantify them. And in this situation the insured cannot organise its affairs or business with any degree of certainty.

[97] The four English cases are not authority for a general proposition that insurers are not liable for consequential loss for breach of duty to assess and determine a claim within a reasonable time. If they can be interpreted as authority for such a proposition, then this Court respectfully disagrees.

[98] Accordingly in relation to Ground 7 the award of $102,960 is reduced by $5,280 to $97,680. Otherwise this ground fails.

Conduct of Counsel

[99] There has in this judgment been criticism of the conduct of the trial by the appellant. It is therefore appropriate to note that counsel for the appellant took no part in the trial at first instance and that his conduct in the proceedings before this Court was beyond reproach. Both counsel in these proceedings were thoughtful and helpful, confined themselves to the real points of contention, were economical with the Court's time, readily conceded points against their interest, and greatly assisted the Court with their written and oral submissions. Any errors in this judgment are the Court's alone.

Conclusion

[100] The appeal succeeds to the extent that the judgment for the respondent of $220,597 is reduced to $178,145 calculated as follows:

1. Loss of the vehicle	$ 31,000
2. Costs of moving the vehicle to repair yards	$1,245
3. Cost of hiring alternative vehicle for 17 months	$97,680
	$129,925
4. Interest from writ (2 December 1998) to Judgment (4 November 2004 at 6%)	$48,220
	$178,145

Costs of this Appeal

[101] The appellants have had some limited success in this appeal however the respondent has retained more than 80% of the verdict below. The respondent made an application for indemnity costs but there is no ground for making such an order especially given that the appellant has had some success.

[102] In the circumstances the Court will make orders that the appellant pay 50% of the respondent's costs of the appeal.

[103] The costs order made by the trial judge stands.

High Court Stay

[104] On 4 March 2005 Connors J made a number of orders. Order 4 provided that a director of the respondent not transfer or encumber a property at 5 Mandarin Place until two weeks after determination of this appeal or without obtaining leave of the Court to do so. Apparently there is an application before the High Court for such leave, there being some urgency because of an offer to buy the said property. At the invitation of counsel for the respondent this Court expresses the view that order 4 of the orders of Connors J should be discharged forthwith. However it should be noted that this Court did not hear argument on this matter.

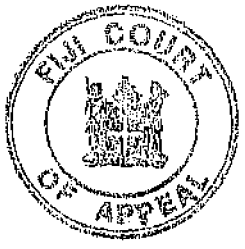
Orders

[105] The Court orders that:

1. The order of the trial judge of November 2004 be vacated and in its place the appellant is ordered to pay the respondent the sum of $178,145 plus the costs of the trial before Byrne J which were fixed at $3,000.

2. The appellant pay 50% of the respondent's costs of the appeal as agreed or taxed.

Pathik, JA



Hickie, JA

Powell, JA

Solicitors:

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