

IN THE HIGH COURT OF FIJI AT LABASA

Civil Action No. 7 of 2004

BETWEEN: Vanualevu Hardware (Fiji) Ltd

Plaintiff

AND: Sun Insurance Company Ltd

Defendant

Appearances : Mr S. Valenitabua for the plaintiff

Mr Adrian Ram for the defendant

Date of Hearing: 4<sup>th</sup> to 8<sup>th</sup> June, 2012

## **JUDGMENT**

### **1. The statement of claim**

- 1.1 The plaintiff had taken out insurance policy no.2000GOO911F1 with the defendant, in respect of his building at lot 17 and 2 ABC Jaduram Street, Labasa . It is alleged that the building suffered loss and damage, as a result of *Cyclone Ami*, which struck Labasa town on 14 January, 2003. In these proceedings, the plaintiff claims indemnification of the loss and damage to his building, in a sum of \$119,500.00.
- 1.2 The amended statement of claim dated 25 August,2008,states that the plaintiff made several requests to the defendant, to have the building repaired immediately. Since its tenant of the building, *New World Supermarket* was threatening to leave, the plaintiff applied for a loan to the Fiji Development Bank, to carry out the repairs. The Bank provided a loan of \$81,923.00.
- 1.3 Due to the shortfall in the loan, the plaintiff instructed its “*sister company*”, Vunimoli Sawmills Limited to carry out the necessary maintenance work. It is claimed that the plaintiff owes \$37,577.00 to that company.
- 1.4 At the request of the defendant, the plaintiff obtained various quotations for the repairs of the building. The plaintiff forwarded copies of these quotations to the defendant.

- 1.5 The amended statement of claim proceeds to state that on 28<sup>th</sup> April, 2003, the defendant offered “\$ 3000” as full and final settlement and thereby admitted its liabilities.
- 1.6 The plaintiff had engaged an independent engineer, to identify the cause of the damage and assess the losses. The particulars of loss and damages are stated to be :“*roof leakage; guttering; down pipes; ceiling; painting; electrical wiring and fittings and skating*”. The report and photographs of the independent engineer were forwarded to the defendant, who had then, increased the offer from \$2,000.00 to \$5,000.00.
- 1.7 It is alleged that the insurance policy is vague, self-serving and inconsistent to the extent that the *contra proferentum* rule of construction ought to be applied, and the defendant cannot rely on the exclusion clause contained in the policy.
- 1.8 The plaintiff alternatively, seeks damages for breach of the policy, wrongful delay and declining of the plaintiff’s claim, special damages, punitive ,aggravated and general damages.

## **2. The defence**

- 2.1 The defendant, in its amended statement of defence, states that the policy cover was extended to include cyclone subject to a “*valid current engineers certificate*”. This was not provided prior to the event .As a result, there was no cyclone cover, as at the date of the loss.
- 2.2 The defendant declined the undated and unsigned claim form submitted by the plaintiff with various quotations attached .
- 2.3 *New World Supermarket* was affected by leakages, prior to the cyclone. In the aftermath, the plaintiff failed to mitigate its losses.
- 2.4 The alleged damages is grossly exaggerated and was not a result of *Cyclone Ami*.
- 2.5 The defendant states it offered an ex-gratia payment initially of \$2,000.00 and later \$5,000.00, with a denial of liability. It has not admitted liability at any time.
- 2.6 It is claimed that repairs to the building were undertaken by an associated company, in order to falsely represent that repairs had been effected, when they were not. The two companies are essentially the same entity.
- 2.7 It is alleged that the plaintiff had failed to disclose to the defendant, neither at the time of the proposal nor at the time of renewals, the following matters, namely, that;
  - a) the building was already leaking and was not in a good state and condition,
  - b) the roof was in need of repairs,
  - c) the storm water drains were inadequate and were not clean from debris, as was the gutters.

The defendant states that if these material matters, which caused an overflow leakage and the resultant damage, were disclosed, the cyclone cover would have been refused.

- 2.8 The defendant was justified in declining the claim. The plaintiff is bound by the terms of the policy, including the exclusion clause.
- 2.9 The plaintiff's compensation claim does not relate to cyclone damage.

### **3 *The plaintiff's reply***

- 3.1 The plaintiff, in his reply to the amended statement of defence, states that the defendant had not rejected its claim on the basis that the premium was not paid or that the engineer's certificate was not provided, but on the ground that the damages were non-existent or not attributable to the event. The sums of money offered to the plaintiff were the damages estimated by the defendants' engineers and therefore liability was admitted.
- 3.2 The plaintiff provided the defendant with four quotations "*and thereby confirming that the cost of repairing the building at that material time was \$119500*".
- 3.3 The plaintiff mitigated its losses when it instructed its "*sister company*" to commence repairs.
- 3.4 It applied for a loan to repair the building, when the defendant declined its claim.
- 3.5 It is also stated that the building was devoid of defects, prior to the cyclone .
- 3.6 The issue of non-disclosure was not taken up by the defendant, when it declined the claim.

#### **4.1 *The evidence given for the plaintiff***

4.1.1 Nathan Kirk, a civil structural engineer and Managing Director of Houg Lee Kaba Jacob, Civil and Structural Engineers testified. In November, 2003, Bashir Khan, a Director of the plaintiff company had asked him to inspect the roof of the building, since he was not happy with the report given by the engineer engaged by the defendant. Nathan Kirk said the roof was "*most likely*" damaged by the cyclone. He said the damage was consistent with that caused by a cyclone. The roof required significant repair. The cyclone screws on the roof had been pulled out. He produced his report dated 18 November, 2003, and several photographs taken of the roof and ceiling, on that date.

He said he disagrees with the reports of the loss adjuster and Shri Singh & Associates Ltd, the engineer appointed by the defendant of 3<sup>rd</sup> March, 2003, and 7<sup>th</sup> April, 2003, respectively, which provide that a number of ceiling areas and the roof were leaking, prior

to the occurrence of the cyclone; some roof screws and nails were loose and flashings not correctly installed, causing possible leaks.

In cross-examination, this witness said albeit, he had not seen the building prior to the cyclone and time had lapsed between the event and his inspection, this would not make much difference in assessing the damage caused by water seepage. Since the roof was 19 to 20 years old, he agreed there was a weathering process. He said that the ceiling could have been damaged, prior to the cyclone, as stated in the report made by Shri Singh & Associates Ltd, the engineer engaged by the defendant. The flying debris was indicative of the roof being damaged by cyclone. When shown a photograph of the roof, he said the general maintenance of the building was not the best. The ceiling damage was recent and the walls depicted signs of leakage. The purloins were damaged, but were not rotten. As regards a photograph showing a hole in the roof that was fresh, he agreed that it was not rusty and such a gap would not be left unattended for eleven months. When shown a photograph which depicted that a section of the roof would not have been painted, his answer was that one beam would not have been painted. This witness concluded his cross-examination stating that this was the only building he inspected that was damaged by *Cyclone Ami*.

4.1.2 Vivek Nand, Manager, *New World Supermarket* said that the roof and ceiling of the building were not leaking, before the cyclone. Water was not seeping from the top floor. The roof was in good condition and normal maintenance was done, prior to the event. During the cyclone, the top floor was leaking. Major repairs were done to the building, ten to twelve months after the cyclone. Several carpenters worked. The roofing iron was changed. The leaking stopped.

It emerged in his cross-examination that prior to the cyclone, buckets were kept on one side of the lunch room on the first floor, to collect water that dripped from the roof, in heavy rain. When there was blockage caused by rain, the gutters would be cleaned. The leaking would then stop. The big fridge on the first floor also leaked. He was referred to a letter dated 1<sup>st</sup> May, 2003, addressed to the Managing Director of the plaintiff by *New World Supermarket*, as regards the leaks, prior to the event. Repairs were effected by the owner of the building, immediately after the cyclone and the leaking stopped. He was asked whether he had noticed there were water marks on the wall and that the ceiling was damaged, when he accompanied engineer Shivas Singh, in 2008, to inspect the building.

He answered in the affirmative. It was suggested to him that Shivas Singh had inspected the building and found that the roof was not changed. His response was that some parts of the roof was changed. He also said that more than ten ceiling sheets were changed. He denied that the building showed signs of damage, prior to the cyclone.

In re-examination, he confirmed that prior to the cyclone, in heavy rain, water dripped when the gutters were blocked with leaves. In the aftermath, water leaked resulting from the state of the roof.

4.1.3 Abdul Majeed, a carpenter working for the plaintiff's associated company, Vunimoli Sawmills Ltd said that he carried out the maintenance works of the building, thrice a year. The tenants, New World Supermarket had not complained to him that there were leakages, prior to the cyclone. The force of the cyclone had damaged the roof, the flashing had torn and the cyclone screws had been uplifted. Many large branches were on the roof. The downpipe was damaged and there were leakages in the drain. The door of a freezer kept on the top floor had broken and fallen on the roof leaving a big hole. Immediately after the cyclone, minor repairs were done to the roof and downpipes.

He said major repairs had commenced in March, 2004, and had taken three and a half months. Fifteen to sixteen labourers had worked. He said only the roofing iron that was damaged, was changed. The roof was painted, as the old roofing iron was discoloured. The flashing on the side, the guttering was plastered with concrete and the down pipes were also repaired. The timber and rafters were changed as they were rotten. Half the ceiling sheets were changed.

He produced three invoices bearing nos 188802, 188803 and 188804, all dated 29 March, 2004, issued by Vunimoli Saw Mills Ltd, which itemised the materials sold to the plaintiff. He said the materials used for the repair, included, 84 roofing sheets, 130 pieces of roofing iron, 350 sheets of "*mansonite board*", primer, sand, cement and pvc pipes. The materials were taken by a ladder to the roof.

In cross-examination, he admitted there was a big crack/hole on the roof, as reported by the plaintiff's engineer. He said this was not patched, while the other holes were patched with evostick. A new roofing was laid. He denied that there was poor maintenance of the roof and ceiling or leakages, prior to the event.

It was put to this witness that Reginald Woods, the loss adjuster appointed by the defendant had, one month after the event, found that no repairs were done to the roof. The loss adjuster had also not found a big hole/patch on the roof, at this time nor when he had inspected the building on the second occasion, ten months later. His response was that he was not aware that a loss adjuster had inspected the roof, at any stage.

Photographs taken in September, 2008, after the major repair by the engineer appointed by the defendant, were shown to this witness. These photographs depicted water damaged ceiling boards, watermarks from roof, rusting old roofing and a section of the repainted ceiling and the roof. He denied that the roof was not repaired.

It was put to him that the three invoices obtained by the plaintiff were fraudulent. There was no delivery note number indicated in the invoices. He sold and delivered the materials, all of which came in one go. The paint was used for the roof. It was suggested that the whole building could be painted with the 234 tins of paint (each of 4 litre), itemised in one of the invoices. He then said the paint was also used for the ceiling.

When questioned as to how he knew that the roofing iron and the timber underneath the ceiling were rotten, Majeed said that he had taken out the ceiling sheets, where water had dripped.

Counsel for the defendant, Mr Ram put to the witness that neither the engineer, (who inspected the building at the request of the plaintiff) nor the loss adjuster had reported that there was any damage to the electrical system and the concrete works. The response of the witness was that there was a temporary disconnection of electricity, in the aftermath of the cyclone. He said the wall was damaged and consequently repaired.

- 4.1.4 Surendra Prasad, Branch Manager of Fiji Development Bank stated the plaintiff had obtained three quotations for the repairs. The Bank and plaintiff decided that the repair works be granted to Vunimoli Sawmills Limited, as their price was the lowest. It was an agreed fact that the Bank had an interest as a mortgagee on the property and gave a loan of \$ 81,823 .

Surendra Prasad produced the review of the account which stated a loan was given to carry out *“the necessary repairs to avoid the condition of the roofing from deteriorating further. A sum of \$50,000 was released to the Parent Company Vunimoli Sawmill Ltd which would be carrying out the repair works. Since this is related company, further*

*release of funds was conditional in that the client was to provide full evidence of expenditure together with an Engineer's report. The repair works have now have been fully completed ... My inspection confirms that all works have been completed and that there is no leakage. However, I have advised that the Bank will only proceed to release loan funds once they produce all the receipts together with the Engineer's Report".*

In cross-examination, it was commented that the plaintiff's undated financial projection statement for 2004, did not depict the cost of the repairs claimed to have been done, consequent to the cyclone. Instead, a figure of \$ 10,000 was given for each of the years 2002,2003 and 2004. The answer of the witness was that it was a projection. The Bank released the monies on the basis of the damages caused to the building, as depicted in the photographs.

Surendra Prasad agreed that there was no necessity for Vunimoli Sawmills Limited to invoice material to the plaintiff, when the plaintiff had entered into an agreement with that company to carry out the entire repairs for a fixed sum. He also agreed that three different contractors had used the same order in setting out the repairs to be effected, including the same misspelling of the term skirting. He admitted that the plaintiff company and Vunimoli Sawmills Limited were controlled and run by the same person, Bashir Khan. In this context, the witness's attention was drawn to two letters written by Bashir Khan, on the one hand, as Director of the plaintiff company to its lawyers and on the other, as Director of Vunimoli Sawmills Limited to the Managing Director of the plaintiff company, both with respect to the repairs to his building.

In re-examination, Surendra Prasad said the quotation provided by Vunimoli Sawmills Limited was the cheapest. The plaintiff and Vunimoli Sawmills Limited are separate legal entities.

- 4.1.5 Bashir Khan, a Director of the plaintiff company testified. He said that Abdul Majeed was employed on a full time basis and in charge of the maintenance of the building, as well as that of Vunimoli Sawmills Limited. Repairs of the building were effected, a month before the commencement of the cyclone period. There were no leakages, prior to the event.

He said immense damage was caused to the building, by the cyclone. There was a branch inside the roof and the door of the freezer placed on the top roof had broken. There were holes in the roof and the cyclone screws fixed on the roof had come out. He called for

three quotations from three companies. These companies provided quotations as follows: Labasa Builders in the sum of \$ 125,000/, Trimerline Building Contractors Ltd in the sum of \$129,900/, Northern Joinery in the sum of \$ 149,800 and Vunimoli Sawmills Limited in the sum of \$ 119,500/.These were given to Fiji Development Bank. The witness said Vunimoli Sawmills Limited belongs to him. The Bank accepted the quotation given by Vunimoli Sawmills Limited. In the first instance, minor repairs were effected. The major repairs effected were the replacement of the following items: the damaged roofing iron; timber and purlins; the ceiling and electrical wiring. The guttering was repaired and the roof was painted.

He produced a photograph taken by Nathan Kirk, which depicted the witness's hand showing that a cyclone screw was loose. Several photographs taken after the repair, were also produced. Majeed had done temporary repairs, patching the holes on the roof with evostick.

In cross-examination, it emerged that Nathan Kirk's report does not speak of any damage to the electrical works. The engineers employed by both parties stated there was no damage to the concrete works. In support of the proposition that leakages arose prior to the event, a report made by the Bank to its management, which stated that “ *80 % of the defects in the building was due to the company's negligence in carrying out the necessary periodical maintenance*” was shown to the witness.

Bashir Khan was asked the reason invoices were issued to the plaintiff, when the contract between the plaintiff and Vunimoli Sawmills Limited contemplated that the repairs were to be effected for a quantified sum. His answer was that the invoice was directly raised, due to the plaintiff's lack of financial resources and since he desired to know what materials were to be used.

## **4.2 *The evidence given for the defence***

### **4.2.1 Reginald Woods,**

Reginald Woods, a chartered loss adjuster from McLarens Toplis said he was requested by the defendant, to assess the damage to the building. He produced his preliminary report dated 3 March, 2003, and several photographs he had taken of the roof, on that day. He observed water in the ceiling. The whole of the ceiling was not affected, only sections. Water entered due to the overflowing of the gutters, which were full of debris. The roof



was reasonably in a good condition. Rain water had entered due to the velocity of cyclone, and went over the already damaged areas.

He said the rotting of timber could not occur in a week, but would take a year or more. He relied on a photograph he had taken of part of the ceiling, which had two boards temporarily attached. This depicted that part of the ceiling was sagging substantially and the skirting at the corners were rotting.

In cross-examination, he admitted that it was in his best interests to assist the defendant. He denied that he had not met Bashir Khan, when he inspected the building. No repairs were evident at that time.

His final assessment was that there was no damage caused to the building by the cyclone.

#### 4.2.2 Shivas Singh

Shivas Singh, Engineer said he inspected the premises in April, 2003, on the instructions of McLARENS TOPLIS. He said it was evident that the roof had leaked during the cyclone. There was no evidence of electrical failure. His assessment of the water marks and the rotting of timber was that the leakage was not recent. The cyclone screws were loose initially, due to poor maintenance and subsequently they got loose after the cyclone. The roofing sheets were dented, as a result of people walking on the roof.

He said it was difficult to assess the damage caused by the event, due to poor maintenance of the building. There was no necessity to change the entire roof. 5 % of the ceiling was damaged. The photographs taken by Reginald Woods supported his findings. He found that temporary repairs were done, after the event.

Shivas Singh said he made a second inspection, in 2008. He found that the ceiling had been painted, but was not changed in its entirety. The roof was in the same condition, it was five years earlier. Silicone and flashbond had been used to seal joints, in the short-term. Repairs were effected, but not to the extent claimed. In support, several photographs were produced. Referring to the materials itemised in the invoices issued by Vunimoli Sawmills Limited, he said the stated quantity of 84 sheets of roofing and 350 mezzanite boards would be required to replace the entire roof and ceiling. Likewise, with 40 cubic meters of sand and 87 bags cement invoiced, the entire building could be re-plastered. He

further said there was no space to stack the material. There was no necessity to paint the entire roof. The quantity itemised was five times the requirement to paint the entire roof . The paint used was unsuitable and hence was peeling off, from the roof. There was no damage to the electric works nor the concrete works. Cement, sand and several other building material including PVC pipes were redundant The large quantity of cyclone screws, nails and pvc pipes were also superfluous. The tiles were not changed, so he saw no necessity for glue, which was also set out in one of the invoices.

As regards the report given by Nathan Kirk, the witness said that since it was made eleven months after the cyclone, it could not conclusively say that the damage was caused by the insured peril. The report was in favour of the plaintiff. Shivas Singh said the engineer's cyclone certificate was full of errors. That engineer had been struck off the role.

In cross-examination, he said that a new roof does not require painting. The unloading area near *New World Supermarket* had limited space to store material.

#### 4.2.3 Thomas Naua

Thomas Naua, Claims Manager of the defendant testified as to the policy granted. He said the plaintiff's claim was received together with four quotations for repair of the building. The defendant had appointed McLARENS TOPLIS, as loss adjusters. This company had suggested that an independent engineer be appointed, since their view was that the damage was unrelated to cyclone.

The witness was referred to clause 6.3.3 in the policy, which provides that unrepaired damage caused by prior leakages was not covered by the policy. He was also referred to the clause that provided that 20 % of the loss was to be borne by the insured. The defendant's position was that the damages were caused by leakages, that arose prior to the cyclone. He said the claim was outside the policy. Relying on the reports produced, he said there was no electrical damage. He said he would give a total depreciated value for a 13 year old roof.

Thomas Naua said three offers of settlement were made to the plaintiff commencing with an offer of \$ 2000 on 28<sup>th</sup> April, 2003, and culminating with an offer of \$ 5000 on 24<sup>th</sup> December, 2003, as accounted for by the engineer.

In cross-examination, Mr Valenitabua, counsel for the plaintiff suggested that the defendant had not made its initial offer of settlement by its letter of 28 April, 2003, on a without prejudice basis. In re-examination, the witness said offers were made to the plaintiff, as a settlement.

#### 4.2.4 Navin Prakash

Navin Prakash said he had worked at *New World Supermarket* from 2001 to 2008. There were leaks, prior to the event. Buckets were kept permanently on one side of the lunch room, where heavy leaks were prevalent in three areas. After the cyclone, the damaged parts of the ceiling were replaced and painted. No major repairs were effected .He did not see sand nor large amounts of building material stacked in the unloading bay. In cross-examination, he said that in 2004, only the ceiling was changed, not the roof. In the event, major repairs were effected, he said he would have seen “*plenty people*”.

### 5. *The determination on the condition precedent*

5.1 The first and fourth issues read as follows;

*Whether the Plaintiff had a valid Insurance Policy to cover for Cyclone damage as at the date of loss?*

*Whether the “cyclone cover extended by the policy was not effective as at the date of loss?”*

5.2 The plaintiff had taken out a fire and extraneous insurance policy. This was extended to include “*cyclone subject to a valid current engineer’s certificate*”, being provided. It was thus a condition precedent to the cyclone cover, that an engineer’s certificate be made available. The engineer’s certificate was forwarded to the defendant on 15<sup>th</sup> April, 2003, after the event, as provided in the agreed facts.

5.3 Mr Ram, in his closing submissions, argues that “*strictly speaking, there was no effective cyclone cover*”, since the engineer’s certificate was received by the defendant, after the event.

Mr Valenitabua, in his closing submissions, rhetorically asks the question as to why the defendant agreed to pay \$ 2000 and then increased it to \$2500, if there was no valid insurance policy.

I will examine the correspondence relied on by Mr Valenitabua.

5.4 Firstly, on 28<sup>th</sup> April, 2003, the defendant wrote to the plaintiff, in these terms:

*Re : CYCLONE AMI CLAIM*

*Date of Loss : 14<sup>th</sup> January 2003*

*We refer to the above claim and advise that after having perused the Structural Engineers Report and the Adjusters Report we advise that not all the damage being claimed is related to the Cyclone in mention and in view of this we hereby offer full and final settlement as follows:-*

<i>Loss Adjustment</i>	<i>\$3,000.00</i>
<i>Less Policy Excess</i>	<i><u>\$1,000.00</u></i>
<i>Cash Settlement Offer</i>	<i><u>\$2,000.00</u></i>

*Enclosed is a copy of the Discharge Form which needs to be signed and stamped by both yourselves and Fiji Development Bank. .... (emphasis and underlining added)*

5.5 There is another letter dated 4<sup>th</sup> July,2003, where the defendant offered an additional \$500.00, invoking the vocabulary of a “without prejudice basis”.

5.6 I would also refer to a letter dated 12<sup>th</sup> August, 2003, from the defendant to the plaintiff’s solicitors, which reads as follows:

*Please note that as per the assessors and structural engineers upon their inspection of the building. The roofline failed to reveal any substantial damage that they could attribute to cyclone. Further the damages and rainwater entry to the building were due to collection of debris over a period of time and damages were old. **Looking at the circumstances of the loss the claim was not admissible.***

*However to keep a good customer relation and taking consideration Fiji Development Bank interests on the policy. We offered an ex-gratia settlement of \$2000.00 to the client being full and final. (emphasis added)*

5.7 Finally, by a letter dated 24<sup>th</sup> December,2003, the offer was increased to \$5000 .

5.8 The legal question that arises is whether the defendant had lost the right to rely on the condition precedent, by affirmation (or, using alternative nomenclature, election or waiver) or by estoppel. I need refer to few authorities.

5.9 The classic statement on the doctrine of waiver is contained in the judgment of Lord Diplock in ***Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd***, (1971) AC 850 at pages 882 to 883:

*““Waiver” is a word sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him. . This arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did. He is sometimes said to have “waived” the alternative right, as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition; but this is better categorised as “election” rather than as “waiver”.*

Lord Goff of Chieveley in ***Motor Oil Hellas (Corinth)Refineries SA v Shipping Corpn of India (The Kanchenjunga)***,(1990) 1 Lloyd’s Rep 391 at pg 398 stated :

*“..an election ..can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms,..... (emphasis added)*

***Spencer Bower, Estoppel by Representation***, 4<sup>th</sup> ed (2004), para X.3.31:

*“Waiver by election. Where the insured fails to comply with a procedural condition but with knowledge of this fact and of the right to reject the claim the insurer chooses not to reject the claim and communicates that*

***decision to the insured either by words or conduct, the insurer will be bound by that decision...***” (emphasis added)

5.10 I turn now to two crucial letters themselves, which I have set out in full. The letters of 28<sup>th</sup> April and 12<sup>th</sup> August, categorically state that the defendant had reached the conclusions set out therein, on a consideration of the reports of the structural engineer and loss adjuster. I conclude that there was affirmation of the policy. The letters do not in my opinion, constitute mere offers. Moreover, the defendant had not advised the plaintiff at any stage, that the cover was declined and had accepted the premium for the insured peril for the relevant period, albeit after the event, as provided in the agreed facts. In my judgment, the defendant, by its conduct, had clearly waived compliance with the condition precedent of a “*valid current engineer’s certificate*”, being provided.

5.11 A fortiori, Thomas Naua, Claims Manager of the defendant, in his evidence in chief, stated that the defendant was relying on the exclusion clause in the policy.

## **6. *The determination***

I proceed to determine the other issues in this case.

### **6.1 *Can the defendant rely on the non-disclosure of material facts ?***

6.1.1 The statement of defence advances the argument that the policy was voidable on the ground of non-disclosure of the following “*material facts*”, namely, that the roof was in need of repair, the storm water drains were inadequate for the purpose of removing storm water and the building was not in a good state of repair.

6.1.2 The plaintiff’s reply to the statement of defence, was to the effect that this argument is raised as something of an afterthought, since the matter of non-disclosure was not taken up by the defendant, when it declined its claim.

6.1.3. Mr Ram’s argument is that the defendant is entitled to have the policy avoided on non- disclosure of the material facts outlined above. I do not accede to this argument.

6.1.4 I agree with Mr Valenitabua, that there is no duty on an insured to disclose facts ,which an insurer could have discovered by making inquiry themselves. I find authority for this basic principle of insurance law in *Hardy Ivamy, General Principles of Insurance Law*, (6<sup>th</sup> Ed, 1993) , page 155.

The following excerpt from a passage of the judgment of Lord Mansfield in *Carter v Boehm*, 97 ER 1162 at 1165 as cited by Mr Valenitabua, in his closing submissions and resonated by Mr Ram, supports this principle:

*“Good faith forbids either party by concealing what he privately knows to draw the other into a bargain from his ignorance of that fact and his believing to the contrary”.* (emphasis added)

More pertinently, His Lordship stated :

*“. But the means of information and judging are open to both; each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other.”* (emphasis added)

6.1.5 Mr Valenitabua, in his closing submissions, has invited my attention to the original Fire Proposal form filled by the plaintiff. Under the cage titled “ *PARTICULARS OF BUILDING*”, only one question was posed as regards the construction of the roof, which was answered “*iron*”. This cover was extended to the insured peril “*subject to a valid current engineer’s certificate*”. This certificate titled “*STANDARD FORM FOR UPGRADING EXISTING STRUCTURES FOR CYCLONES*” and dated 3<sup>rd</sup> April, 1999, engineer L.Y.Waqainabete had classified the building as having a reasonable and good level of cyclone resistance. It was further provided that the roof frame was “*adequate*” and the roof of corrugated roofing iron was “*well nailed*” and “*adequate*”. The evidence disclosed that this certificate was valid for a period of five years.

6.1.6 There is no evidence before me that the defendant had challenged the contents of this certificate. Accordingly, Mr Ram’s contention, in his closing submissions, that the engineer’s certificate was questionable and the maker has been struck off the engineer’s roll, as asserted by Shivas Singh in evidence, is unacceptable.

6.2 ***Was the plaintiff’s building damaged as a result of Cyclone Ami and if so such loss or damage was duly covered by the policy ?***

6.2.1 The defendant’s standpoint was that the damages to the building arose, as a result of pre-existing leakages. The defendant seeks to bring itself within the exclusion clause of the policy, which I set out below.

6.2.2 Clause 6.2.5 of the policy provides that no claims will be admitted in respect of damage caused by “*water or rain, unless such loss or damage is caused by walls or roof(s) made by the tropical cyclone*”. (emphasis added) The other matters included in clause 6.2 are unnecessary to refer to.

There is then clause 6.3 which contains certain exclusions. This clause provides that it “*is a condition of this extension* (that) :

*6.3.2 . the Insured shall use due diligence to minimise damage.*

*6.3.3 . should any damage to buildings or contents by any of the insured perils have occurred prior to the commencement of this insurance, such damages not having been repaired or made good the Company shall not be liable for damage occurring subsequently.*

*It is further provided that in the event of loss by cyclone the sum insured will be reduced but may be reinstated upon application to the Company and upon the payment of a full annual premium based on the amount of the loss but always subject to acceptance by the Company.*

*The deductible applicable in this section will be 20% of the amount of the final adjusted loss or F\$1000 whichever is the greater but not exceeding 10% of the sum insured as stated in the schedule of the within policy. (emphasis added)*

6.2.3 As I read the exclusion clause relied on by the defence, it is evident that what is excluded are damages that occurred, prior to the commencement of this insurance. The insurance cover began on 12 October,2000, and was renewed annually thereafter.

6.2.4 I will now consider the evidence adduced as regards the leakages, prior to the cyclone. Bashir Khan, a director of the plaintiff company and Majeed, who was in charge of the maintenance of the building testified that there were no leakages, prior to the event. Nathan Kirk,who inspected the building at the request of the plaintiff , states in his report, that there were no signs of water leakages before the event, as reported by an employee of *New World Supermarket*.This employee was not called to testify.

6.2.5 It was elicited in the cross-examination of Vivek Nand, Manager, *New World Supermarket* that in heavy rain, there were leakages in the lunch room, before the event. Naveen Prakash, a former



employee of *New World Supermarket* and a witness for the defence confirmed that there were leakages, on one side of the lunch room.

Mr Valenitabua, has reproduced in his closing submissions, an excerpt of the evidence of Naveen Prakash, at the prior hearing of this case before Madame Justice Scutt, in support of his contention that Mr Ram had directed this witness to say that there were water leakages. The short answer to this submission is that this piece of evidence was not put to Naveen Prakash, at the *de novo* hearing before me. The contention is in my view, quite inappropriate. With that digression, I return to the issue under consideration.

6.2.6 Reginald Woods, loss adjuster of McLARENS TOPLIS in his report dated 3<sup>rd</sup> March, 2003, states that it “ *is evident from our inspection and discussions that rainwater has been entering the building for a period of time and before the cyclone occurred...*”. In his evidence in chief, he stated that rain water had entered due to the velocity of the cyclone and went over the earlier damaged areas.

6.2.7 Shivas Singh, the engineer, said it was evident that the roof had leaked during the cyclone. In his initial report, he states that “*very minimal cyclone damage has occurred to the structure in general*. He states further that:

*“Some areas of roof leaks were evident from observing the ceiling on the top floor. We were advised by the tenants that this roof was already leaking prior to the event, and that **during the cyclone, the volume of leaks experienced were greater (which would be expected due to the higher volume of rainfall).**”*  
(emphasis added)

6.2.8.1 Mr Ram placed great reliance on a report of Kamlesh Kewal, Senior Loans Officer of the Bank, as produced by Surendra Prasad, which provides that “*.on my inspection, it is very clear that 80% of the defects in the building is due to the company’s negligence in carrying out the necessary periodical maintenance of the building. The building has been leaking prior to the Cyclone. The Client Company is trying to capitalise on the Cyclone Ami to carry out all repairs*”. I reject that report. The Bank was not in occupation of the building, to comment on the leakages nor does a bank officer have the expertise to report on the condition of a building.

- 6.2.8.2 In his cross-examination of Vivek Nand, Manager of New World Supermarket, Mr Ram relied on the words: “..leakage occurs from all sides of the building damaging our stock. After Cyclone Ami we have to pile stocks on pellets to save from getting wet” in a letter dated 1 May, 2003, addressed to the plaintiff by New World Supermarket, to support his proposition that leakages had occurred, prior to the event. I do not consider there is anything in the point, as what the letter goes on to make abundantly clear is that “*this leakage .. had started after Cyclone Ami*”.
- 6.2.9 The preponderance of evidence suggests that there were leakages, prior to the cyclone. In my view, these leakages were the sort of incident occupants of buildings sometimes experience, when there are heavy rains and is obviated by the use of buckets, as was done by *New World Supermarket*.
- 6.2.10 It is frequently the case that losses arise from two or more events, one of which is an insured peril and the other is uninsured or an excluded peril.
- 6.2.11 The leading authority on ascertaining the proximate cause of a loss is *Leyland Shipping Co v Norwich Union Fire Insurance Society*, (1918) AC 350 at page 369 where Lord Shaw of Dunfermline stated:
- “ What does “proximate” here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. **The cause which is truly proximate is that which is proximate in efficiency.** That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed. ”* (emphasis added)
- 6.2.12 Lord Sumner in *Becker, Gray & Co. Limited v London Assurance Corporation*, (1918) AC 101 at 114, preferred to use the plain English expression “*direct cause*” rather than “*causa proxima*”.
- 6.2.13 In *Wayne Tank and Pump Co Ltd v The Employers’ Liability Assurance Corporation Ltd*, (1973) 3 All ER 825 at page 829 Lord Denning stated as follows:

*‘Since Leyland case it has been settled in insurance law that the ‘cause’ of a loss is that which is **the effective or dominant cause of the occurrence** , or, as it is sometimes put,*

*that which is in substance the cause, even though it is more remote in point of time, such cause to be determined by common sense..” (emphasis added)*

6.2.14 In *Lasermax Engineering Pty Limited v QBE Insurance (Australia) Limited & Anor*, NSW, SC 50052/03 (16 March, 2005) the Supreme Court held:

1. *The law of insurance looks to the proximate and not the remote cause of loss or damage.*
2. *The proximate cause is the active, efficient cause that sets in motion a train of events without the intervention of any independent force.*
3. *The proximate cause rule is based upon the presumed intention of the parties to an insurance policy.*

6.2.15 Returning to the present case, I conclude that the incursion of water and the direct cause of the damage, to use the phraseology of Lord Sumner in *Becker, Gray & Co. Limited v London Assurance Corporation (supra)*, was the insured peril, within the meaning of the policy .

### **6.3 The claim for indemnity**

6.3.1 The issues, I have to answer, in this regard are as follows:

*Whether the plaintiff incurred loss in the sum of \$119,500.00 due to the cyclone and whether it was grossly exaggerated?*

*Whether the plaintiff is entitled to the monies claimed by it under the insurance policy?*

6.3.2 Since the dispositive issues are factual and turn principally on the reports of the engineers and the loss adjuster, it is convenient to reproduce salient extracts of these reports.

#### **6.3.3 The report of the structural engineer engaged by the plaintiff**

Nathan Kirk, the Structural Engineer of Houg Lee Kaba Jacob, Civil and Structural Engineers, in his report dated 18 November, 2003, assesses the damages as follows:

##### **3.1 Roofing**

*The roofing iron has been damaged by the cyclone. There are areas where the roof has been damaged by flying debris that have punctured and scraped and paint of the roof. The edges of the large amount of the roofing and flashing has*

*been lifted by the cyclone activity. This will have caused the seal between roofing sheets to break. The broken seal would cause the roof to leak in rain events. The cyclone screws have been lifted in many locations. This has caused irreparable damage to the purlins where the damaged cyclone screws are located.*

*The roof appears to be of good quality construction and has all the cyclone screws present as recommended ... Large suction forces that occur near the edges and ridges of buildings have damaged the cyclone screws. **The damaged cyclone screws need to be replaced ... I would not consider the backing up of the drain to be the cause of the leakage** given the coincidence of the reported leaking and the cyclone and that there are many leaks well away from the perimeter of the building.*

### **3.2 Purlins**

*The purlins have been damaged in two ways. Firstly the screws pulling out of the timber has damaged the timber marking it impossible to securely reattach the roofing iron and weakening the timber cross-section. **An entire length of roofing sheet (one bay wide) will need to be removed to replace the damaged purlins. Only the purlins that either exhibit rotting or have cyclone screws that have been partially pulled out will need to be replaced.***

### **3.3 Ceiling**

*There are many areas where the ceiling has been water damaged and parts of ceiling have fallen in as a result of water ingress related to cyclone Ami. There are areas both on the perimeter of the building and areas well away from the perimeter of the building.*

#### **Recommendations**

***The roof has suffered significant cyclone damage. The roof will need significant work to be repaired.***

#### **Roofing**

*The sections of roofing, that have had the paint abraded off will need to be replaced. The sections of roof have been punctured by flying debris will need to be replaced. The roofing where the cyclone screws have been uplifted will need to be replaced as the roofing has been warped at the edges and there is the possibility of local splitting in the roofing. Practically it is very difficult to reseal a roof when fastening it for a second time and the roof will almost certainly be damaged during the replacement of the cyclone screws and purlins.*

#### **Purlins**

*The purlins that have cyclone screws partly removed from them will need to be replaced. The timber cross section of these purlins is will be significantly damaged and the screws will not be able to be put back in the same holes.*

#### **Interior Ceiling**

*The ceiling has been extensively water damaged and large sections will need to be replaced for two reasons. Firstly sections of the ceiling have fallen in as a result*

*of the water ingress due to cyclone damage and secondly the ceiling will have to be removed when the timber purlins are replaced.*

### **5.0 Conclusions**

- *Cyclone Ami has damaged the roof of the New World Supermarket.*
- *Many cyclone screws will need to be replaced.*
- *The ceiling needs to be replaced.*
- *The roofing needs to be replaced to achieve a watertight roof.*
- *The purlins that the damaged cyclone screws have come out of need to be replaced.*
- *The purlins that have rotted need to be replaced.*
- *This work needs to be completed before the next cyclone season as a large number of the cyclone screws have been partially removed by the force of the cyclone. (emphasis added)*

### **6.3.4 The report of the loss adjuster**

Nathan Kirk's assessment was preceded by an inspection on 3<sup>rd</sup> March, 2003, by Reginald Woods of McLARENS TOPLIS, Chartered Loss Adjusters. There followed his report of the same date with attached photographs. The report reads as follows:

*...There were a number of areas of ceiling damage. These were predominantly small in size and located towards the perimeter walls. It was evident that some of this damage was old due to the rotting of timbers etc. The employee confirmed that a number of these areas were in a damaged condition prior to the cyclone.*

*We then proceeded to the roof area. ... A concrete block parapet wall extends around the entire boundary. .... A box gutter runs the entire length of the building on each side. There are four outlets to each box gutter which allows the rainwater to run off. We observed the roof to be in reasonably good condition .There is no evidence of rusting nor loose sheets etc.*

*We observed the box gutter on one side to be clear of all debris. The other box gutter however had a quantity of rubbish including plastic bags, etc. This would prevent the flow of rainwater via the box gutter and subsequently we believe rainwater would overflow the gutter and seep into the building.*

*We subsequently discussed the matter with Mr Bashir Khan who is the Director of Vanualevu Hardware Fiji Limited.*

*...*

*We informed Mr Khan that **in our opinion rainwater entered the building due to the blockages of the outlets and that our initial thoughts were that the roof was structurally sound and intact.** This was not received well. He has also suggested that cracking is now evident of different sections of the concrete block walls of the building. Whilst we did identify areas of cracking our initial thoughts are that this is not due to any cyclone damage.*

*..*

**Comments**

.....nor could we accept that cracking to external walls was due to cyclone.  
**It is our recommendation that your Company appoints an independent structural engineer to inspect the damage and identify the necessary scope of works caused as a direct result.**(emphasis added)

**6.3.5 The Engineer's report**

Consequent to the recommendation of the loss adjuster, Shivas Singh of Shri Singh & Associates Limited, Consulting Building, Civil and Structural Engineers inspected the building. While stating that “*very minimal cyclone damage has occurred to the structure in general*”, the following assessment was made in their report of 7 April, 2003:

**ROOF**

...

*A roof inspection revealed that some roof screws and nails were loose, and some flashings were not correctly installed, causing possible leaks.*

*The **concrete gutters and downpipes** appeared to be structurally sound, although they **may be undersized** to deal with the rainfall volumes during cyclones.*

*The roof is in need of general maintenance, as would be expected for a building of this age.*

***We envisage that the cost of fixing roof leaks, if these loose screws, etc were caused by the cyclone (not determinable) would be in the order of \$2,000 VIP maximum.***

**CEILING/SKIRTING**

*The first floor ceiling had some areas of substantial water damage (approximately 50 square meters total surface area). The rest of the ceilings were in adequate condition, but in need of general maintenance and painting (not related to cyclone).*

*Some skirting's (minor) were in need of repair, due to leaks from edge flashings.*

***If these leaks were caused by the cyclone, and not general negligence, we estimate that the cost of changing the damaged areas would be the order of \$2,500 VIP.***

**ELECTRICAL**

*We observed that all electrical fittings and lights/power points were functional on the first floor. The warehouse controller advised that no repairs were conducted after the cyclone, and they have not experienced any short circuiting, etc.*

*From this we infer that no electrical upgrading is required due to water damage.*

*You could allow sum of \$ 500 for checks to be completed if it felt necessary.  
(emphasis added)*

It was concluded that the total extent of damage could be a value of “**approximately \$5,000 VIP, provided it were proven that these defects arose during, or in a manner related to the cyclone. It is equally probable that the defects were apparent prior to the event due to adequate repairs and maintenance, and that your clients are trying to have insurance pay for rectification. We are not in position to advise you on which of the above are correct**”. (emphasis added)



6.3.6 Reginald Woods of McLARENS TOPLIS, in his report dated 17<sup>th</sup> April, 2003, addressed to the defendant stated as follows:

***“ADJUSTMENT OF LOSS:***

*Our inspection of the roofline failed to reveal any substantial damage that we could attribute to cyclone. It is possible that a number of roofing sheets have become loose and these will need to be re-tightened. As to rainwater entry to the building, we believe that this was via over flowing of box gutters due to the build up of debris. We did observe various areas of internal water damage to ceilings on the upper level. Our thoughts were that some of these damages were old. Staff of the tenant confirmed our thoughts.”* (emphasis added)

6.3.6.1 It was suggested to the loss adjuster, Reginald Woods and the engineer, Shivas Singh in cross-examination, that they did not inspect the building and take photographs, nor meet Bashir Khan. Mr Valenitabua, in his closing submissions has argued that Shivas Singh had not provided his travel itinerary, that is from Suva to Labasa. The evidence refutes this straw in the wind argument. It transpired in the cross-examination of Vivek Nand, that he had accompanied Shivas Singh to inspect the building. Moreover, I heard the testimony of Reginald Woods and Shivas Singh. I am satisfied beyond doubt, that these persons inspected the building, took photographs and made their respective reports.

6.3.6.2 The first observation I draw from Nathan Kirk’s report, is that he had inspected the building in November, 2003, eleven months, after the event. In his evidence in chief, he said that the damage to the building was “*most likely*” caused by the cyclone and was consistent with that arising from the stated peril. My second comment is that the report, in its introductory paragraph, (which I have not reproduced) refers to a engineer’s cyclone certificate of April, 1992, whereas the relevant certificate is dated 3<sup>rd</sup> April, 1999. Thirdly, several of his conclusions as regards the roof and ceiling, go beyond his findings in the text of his report.

6.3.6.3 Reginald Woods, the loss adjuster, was the first to inspect and document the effects of *Cyclone Ami* on the building. In his report of 3<sup>rd</sup> March, 2003, he came to the conclusion that there was damage to the ceiling, some of which was “*old due to the rotting of timbers*”. In that report and his subsequent report of 17 April, 2003, he attributes the ingress of rain water to the overflow of gutters arising from the build up of debris and rubbish. I find his conclusion as regards the overflow of gutters ,unconvincing. Subject to that qualification, I accept his report.

6.3.6.4 I will deal with the other aspects of the quartet of reports referred to above, in my analysis of the evidence in the succeeding paragraphs.

- 6.3.7.1 The plaintiff claims that repairs to the building in a sum of \$ 119,500.00 was carried out by its “*sister company*”, Vunimoli Sawmills Limited. Mr Ram, in defending the action has advanced three contentions. The first argument was that there was minimal damage to the building, as a result of the insured peril. The second was that repairs were in fact, not effected to many of the items. As a third leg, it was contended that the claim is grossly exaggerated.
- 6.3.7.2 The plaintiff relied primarily on the evidence of Bashir Khan and Majeed, its carpenter, who stated he carried out the repairs. I did not find Bashir Khan and Majeed to be credible witnesses. In their evidence in chief, they both stated that there were no leakages, prior to the event. This was contrary to the evidence of all the other witnesses.
- 6.3.7.3 I would refer to many instances, where I found their evidence to be contradicted by the other witnesses, as to the damages and repairs effected.
- 6.3.7.4 Bashir Khan and Majeed testified that repairs were carried out to the gutters and electrical works. Majeed produced three invoices, which provides that sand, cement, electrical wiring and several other items of building material were issued by Vunimoli Sawmills Limited to the plaintiff. Naveen Prakash, a former employee of *New World Supermarket* stated he had not seen sand and cement stacked in the unloading bay of the building. This evidence of Naveen Prakash was not challenged in cross- examination.
- 6.3.7.5 More importantly, the reports of Nathan Kirk, the engineer who inspected the building at the plaintiff’s request, the loss adjuster and Shivas Singh, the engineer appointed by the defendant, do not provide that there was damage to the concrete or electrical works. In the cross-examination of Majeed, Mr Ram elicited that the electricity was temporarily disconnected. In my judgment, the evidence establishes with sufficient certainty, that the gutters and electrical works were not damaged and consequently not repaired.
- 6.3.7.6 Other parts of Bashir Khan and Majeed’s evidence as regards the repairs effected to the ceiling and roof was contradicted by Shivas Singh, Vivek Nand and Naveen Prakash.
- 6.3.7.7 Shivas Singh, in his evidence stated it was evident, that the roofing sheets were dented due to people walking on the roof. In my view, the photographs of the roof as exhibited do not depict that the roof was “*lifted by the cyclone*”, as stated by Nathan Kirk, in his report. In his final report made in 2008, Shivas Singh has attached photographs to substantiate his conclusion that the



“majority, if not all of the roof sheets, nails and screws have not been changed”. It would appear that the denting of the roof remains.

6.3.7.8 Vivek Nand ,when questioned on the repairs to the roof, faltered for an answer and then said that some parts of the roof was changed. Naveen Prakash, in cross-examination said the roof was not changed. I accept Naveen Prakash’s evidence as truthful. His version of the extent of repairs effected accorded with the evidence of Shivas Singh.

6.3.7.9 Nathan Kirk produced six photographs taken in November, 2003, of different sections of the damaged ceiling. Bashir Khan testified that the damaged ceiling was changed. In cross-examination, Majeed stated half the ceiling was changed with 350 boards. Bashir Khan, produced one photograph of the ceiling, after the repair, in 2004. This photograph demonstrates that one of the six sections of the ceiling, as depicted in Nathan Kirk’s photographs, had been changed. Vivek Nand, in cross-examination, stated that more than ten ceiling sheets were changed. The evidence of Naveen Prakash that only the damaged parts of the ceiling were changed, was confirmed by Shivas Singh, who also stated 5 % of the ceiling was damaged. I am satisfied that the entire ceiling was not damaged and consequently, was not replaced.

6.3.7.10 It is evident from the photographs produced by Bashir Khan, that the entire roof was painted. I agree with Shivas Singh’s comment in evidence, that a new roof does not require to be painted. Shivas Singh’s further stated that the quantity of paint itemised in one of the invoices produced, was five times the quantity that would be required to paint the entire roof.

6.3.7.11 The plaintiff has not exhibited photographs to demonstrate that the purlins and timber were changed. Nathan Kirk’s report provides that “*only the purlins that either exhibit rotting or have cyclone screws that have been partially pulled out will need to be replaced*”. Mr Ram, elicited in the cross-examination of Nathan Kirk that he had not seen purlins that were rotten. I would agree with Shivas Singh and Reginald Woods that ordinarily, the rotting of timber would take place over a period of time.

6.3.7.12 Next, I find Bashir Khan and Majeed ’s testimony to be contradicted by the pleadings and this appeared to me to be quite implausible. I refer to the pleading in the statement of claim and the plaintiff’s reply to the statement of defence, that the plaintiff obtained various quotations for repairs “*and thereby confirming that the cost of repairing the building at that material time was*

\$119500”, that is a lump sum for the entire repair. At the hearing, Majeed produced three invoices in respect of building materials issued by Vunimoli Sawmills Ltd to the plaintiff. This was endorsed by Bashir Khan.

- 6.3.7.13 Mr Ram pertinently asked Bashir Khan and Surendra Prasad why invoices for the building materials were issued to the plaintiff, when the agreement for repairs contemplated a lump sum payment to Vunimoli Sawmills Limited. Bashir Khan’s response was that this was done, due to the plaintiff’s financial position and since he desired to know the materials used. I find this argument hardly of conviction.
- 6.3.7.14 The plaintiff had submitted four quotations to the defendant, including that of Vunimoli Sawmills Limited, with an undated and unsigned claim form. None were approved by the defendant.
- 6.3.7.15 It was submitted on behalf of the defendant that the quotations obtained from Labasa Builders Limited, Trimline Building Contractors Ltd and Vunimoli Sawmills Limited were fraudulent. It was asserted that the quotations were similar in format and contained the identical misspelling of the term “*skirting*”. I find the same spelling of that term employed in the agreement referred to below and the claim form submitted by the plaintiff and yet another spelling in the quotation said to be provided by Northern Joinery.
- 6.3.7.16 In the absence of evidence, I would decline from venturing into a voyage of discovering the common parlance and spelling of that term in the building trade. In my judgment, it suffices for me to find more importantly, that the plaintiff had not substantiated the authenticity of these quotations, by calling its authors.
- 6.3.7.17 This evidence would have justified the plaintiff’s self-dealing with its associated company, Vunimoli Sawmills Limited. The defendant contends that the agreement between the plaintiff company and Vunimoli Sawmills Limited was not an arm’s length contract. Bashir Khan, in evidence in chief stated that Vunimoli Sawmills Limited belonged to him. He was a Director of both companies. It is manifest there is a very clear nexus between the parties to the agreement.
- 6.3.7.18 Majeed stated that all the building materials, including sand, cement, timber and electrical wiring were despatched without a delivery note, in one go. He also testified that the major repairs took three and a half months, commencing in March, 2004. This takes me to sometime in June. In mid

May, Saiyasi Cakau, the plaintiff's architect, in a letter addressed to the plaintiff appears to have confirmed that Vunimoli Sawmills Limited completed the "*maintenance work as per agreement to (his) satisfaction*". He was not called as a witness to substantiate the authenticity of his letter of 15 May, 2004 .

6.3.7.19 The contradictions I have highlighted has led me to the conclusion that the evidence of Bashir Khan and Majeed as whole was unreliable. In contrast, I found Shivas Singh to be an independent and truthful witness. He gave evidence objectively. It transpired in his cross-examination , that the defendant constituted 1% of his clientele.

6.3.7.20 On a review of the totality of evidence, I conclude and find that the plaintiff's claim, in respect of his building, comprises of (a)spurious items that were neither damaged nor repaired; and (b) items of repair that have been grossly inflated.

6.3.7.21 In the light of the above , the conclusion I have reached on the facts is that the damages caused by *Cyclone Ami* were to the extent reported by Shivas Singh, in his final report of 2<sup>nd</sup> September, 2008, which reads as follows:

***Introduction***

*A site visit was conducted on 2<sup>nd</sup> September 2008.....to review the building to establish if it is likely that work, as claimed by the plaintiff to be carried out, had actually been done.*

...

***Observation***

*The following observations were made:*

- *Damaged areas of mezzanite board ceiling have been changed. The entire ceiling has been painted to a basic standard (obviously 1 coat only). The entire ceiling did not appear to be changed. (refer appended photos).*
- *The roof cladding and fixings observed on this instance were of similar condition to that initially observed. There are many areas of loose screws. It is apparent that silicone and flash-band have been used extensively to try to rectify roof leaks. The roof appears to have been painted in recent times (last 4-5 years at a guess) and a lot of paint is peeling off. It does not appear that much if any of the roofs has been changed. (refer appended photos).*
- *The roof is in poor maintenance, needs to be washed, screws tightened and blocked downpipes cleared.*
- *Water marks on internal perimeter walls show clear evidence of continued leakage over time in the building. (refer appended photos).*

***Conclusions from Observations***

*It is evident that:*

- 1. The majority, if not all of the roof sheets, nails and screws have not been changed.**
- 2. Some ceiling boards have been changed. The entire ceiling has been painted.**
- 3. The roof has been painted, and repaired by flash-band and silicone.**
- 4. The building is kept in poor maintenance by the landlord.**

**Documents Review**

*Review of the Vunimoli Sawmills Limited invoice has generated the following comments:*

- 1. The invoice has no delivery note number, therefore no confirmation of delivery.*
- 2. It is not evident on site that 84 sheets of roof cladding were installed.*
- 3. It is not evident on site that 84 sheets mezzanite board were installed.*
- 4. The volume of paint (based on applicant of 10sqm per litre) appears substantially overstated for the building, for cyclone damage repair (ceiling only). The balance of paint should not apply here as this would be repairs and maintenance related, or was not used on site.*
- 5. It is not evident on site that sand, cement, electric wiring, coil strap PVC pipes, Ctf glue were used and this would not relate to cyclone related damage repairs.*
- 6. It is not evident on site that galvanised wire were installed.*
- 7. It is not evident why so many nails were bought.*
- 8. The labour cost for such cyclone repairs is grossly excessive.*
- 9. Cartage and delivery is usually free of charge and should not have been charged. If charged, it should not be so excessive.*

*As such, the bulk of items listed in the invoice were either not installed, or were for repair and maintenance and not cyclone damage.*

**Letter from Architect**

*The letter from Saiasi Cakau is not adequately worded to verify:*

- 1. If the work done was as per invoice, using stated materials.*
- 2. If work was done to only rectify cyclone damage, or also include repair and maintenance.*

*Saiasi Cakau is not a member of the Fiji Associates of Architects, and his letter therefore has no standing in confirming the above or certifying for Fiji Development Bank. He is not suitably qualified for this task.*

**Photographs by Bashir Khan**

*Photographs provided by the plaintiff only show conclusively that the roof was cleaned, possibly painted and cosmetic cleaned, possibly painted and cosmetically repaired (as is evident in our inspection).*

*They do not show that roofing, purlins or all the ceiling was changed.*

**Conclusion**

*It can therefore be concluded with a reasonable degree of certainty that based on the evidence viewed on site, and via disclosed photos and documents, only cosmetic repairs, leak repairs and repair and maintenance were undertaken, and the bulk of work claimed has not been done. (emphasis added)*

6.3.7.22 This leads me to Shivas Singh's initial report of 7 April, 2003, where he estimated the expenditure to repair the damages as follows:

*“cost of fixing roof leaks, if these loose screws, etc were caused by the cyclone (not determinable) would be in the order of \$2,000 VIP maximum” and as regards ceiling and skirting “ the cost of changing the damaged areas would be ... \$2,500”.*

6.3.7.23 One of the photographs Nathan Kirk has exhibited depicts that a cyclone screw was loose. Reginald Woods, in his report, states that it is possible that a number of roofing sheets have become loose and needs to be re-tightened. Shivas Singh has made a similar finding. I conclude that these damages were caused by the cyclone. Reginald Woods and Shivas Singh have also reported that there was damage to some of the ceiling sheets. This is attributable to the cyclone, for the reasons I have given in paragraph 6.2 above.

6.3.7.24 The plaintiff's claim is founded on a lump sum contract. The principle that a claim on a lump sum contract is indivisible has been whittled down, in recent years. In my judgment, the plaintiff is entitled to be indemnified the costs of fixing the roof leaks arising from loose cyclone screws in a sum of \$ 2000 and replacing the ceiling sheets in a sum of \$ 2500.

6.3.7.25 Shivas Singh's estimate has not made provision for the painting of the ceiling sheets that were changed. I would award a ballpark figure of 20 % of the cost of replacing the ceiling sheets for painting of the ceiling sheets,. This would amount to \$ 500.

6.3.7.26 The plaintiff's claim succeeds in a sum of \$ 5000.

**6.3.7.27 *Mitigation of damages***

The defence has argued strenuously that the plaintiff had not taken steps to minimise the loss, as required by the policy. At the forefront of the defendant's case in this regard, was that a big crack, as depicted in a photograph exhibited, remained unrepaired. The evidence of Majeed was that evostick was used to patch the holes in the ceiling, but not this particular crack. This was confirmed by Shivas Singh, who said that temporary repairs were done. In my judgment, the plaintiff had done temporary repairs to minimize the damage, albeit those repairs may not have been the best.

**6.4 The alternative claim for damages**

In view of my above finding, the plaintiffs' claim for consequential damages for breach of the policy, for wrongful delay, declining of the claim and other damages sought do not arise for consideration.

**6.5 Costs**

Generally, the party who succeeds pays the other side's costs. In the present case, it transpires that the plaintiff's claim succeeds in a sum of \$ 5000. The plaintiff had declined to accept the offer made by the defendant on 24 December, 2003, of a sum of \$ 5000 and filed these proceedings thereafter. It is only but right that the plaintiff shall pay the defendant, the costs of having to respond.

The *White Book (Supreme Court Practice 1988, Vol 1 )* at paragraph 62/9/5 provides:

*“Where a defendant, after a writ issued, offered an undertaking in terms of the writ and to pay costs, and the plaintiff, notwithstanding, delivered a statement of claim, and moved for injunction it was held that the defendant was entitled to costs subsequent to the offer, the plaintiff having the costs up to that time and the costs of the day (Jenkins v. Hope [1896] 1 Ch. 278). (emphasis added)*

**7. Orders**

- a) The defendant shall pay the plaintiff a sum of \$ 5000.
- b) The plaintiff's alternative claim for damages for breach of the policy is declined.
- c) The plaintiff's claim for wrongful delay, declining of claim and other damages sought are declined
- d) The plaintiff shall pay the defendant costs summarily assessed in a sum of \$ 4000.

25<sup>th</sup> April, 2013

**At Labasa**

**A.L.B. Brito- Mutunayagam**

**Judge**