IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 02 OF 2014

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

PLAINTIFF

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

DEFENDANT

Counsels:
Mr B C Patel for the plaintiff
Mr W Pillai for the defendant

Date of Hearing : 25 April 2014
Date of Judgment : 30 May 2014

J U D G M E N T

Introduction

[01] Kalabo Investment Limited, plaintiff filed an application for summary judgment against the New India Assurance Company Ltd, defendant pursuant to Ord. 14, r.1 of the High Court Rules 1988 (the HCR). The application is supported by affidavit of Rattan Deo sworn and filed on

30 January 2014 (Supporting Affidavit). The supporting affidavit annexes documents marked "A"-"D". The application seeks for the following orders:-

(a) That judgment be entered against the defendant in the sum of $300,000.00 being part of the claim stated in the Statement of Claim filed herein; and

(b) That the defendant pay interest at the rate of 10% per annum compounded pursuant to s.34 Insurance Law Reform Act 1996 calculated on $150,000.00 from 1 June 2012 to the date of payment and on $150,000.00 from 15 March 2013 to the date of payment.

(c) That the costs of this application be paid by the defendant.

[02] At hearing, Mr Patel counsel for the plaintiff sought leave to amend the application to claim $148,500 for flood claim (i.e. $150,000 less excess of $1,500) instead of $150,000. Mr Pillai counsel for the defendant did not oppose this application for amendment. I therefore granted leave to amend. Accordingly the amended sum of $148,500 plus $150,000 for the cyclone Evans claim would total $298,500 instead of $300,000. It is now to be read as the plaintiff seeks summary judgment in the total sum of the $298,500.

[03] The defendant filed affidavit of Avinesh Rai, Insurance Officer employed by the defendant sworn and filed on 4 April 2014 in opposition. The affidavit in opposition filed by the defendant annexes no documents whatsoever. The defendant opposes the application on the grounds:

(i) That summary judgment is not appropriate when there will be other issues pending for determination at trial; and

(ii) That the Plaintiff is not entitled to the admitted sum of $298,500.000 without providing the Defendant a final Discharge in full settlement of both the flood and cyclone claims.

[04] The Plaintiff then filed affidavit of Abhishek Abhimannu, Chief Financial Officer of the plaintiff company sworn on 16 April 2014 and filed on 17 April 2014 in reply (affidavit in reply). That affidavit annexes two documents marked as "AA1" and "AA2".

[05] The matter was argued on 25 April 2014 and both the parties tendered their respective skeleton written submissions.

Background

[06] The plaintiff owns and operates "Shop N Save" supermarkets throughout Viti Levu. The Plaintiff had a valid Material Damage ("MD") and Business Interruption ("BI") insurance policy issued by the defendant for all its 14 stores. The Policy, inter alia, insured loss and damage at any store to refrigerated goods resulting from power failure caused by floods and cyclones. On 30 March 2012 the refrigerated goods in the Plaintiff's stores at Market Subdivision, Ba; Sahu Khan St, Nadi and Lodhia Street, Nadi were damaged as a result of power failure caused by floods of that day; and on 17 December 2012 the refrigerated goods in the Plaintiff's stores at Yasawa Street, Lautoka; Market Road, Nadi and Main Street, Tavua were damaged as a result of power failure caused by Cyclone Evans of that day. The Plaintiff lodged the following claims under the policies:

(i) 30 March 2012 flood claims:

Location	Amount Claimed	Date Lodged
Lodhia St, Nadi	$157,525.97	01/05/12
Sahu Khan St Nadi	$183,476.95	01/05/12
Market Subdiv, Ba	$163,210.92	01/05/12
Total	**$504,213.84**	

(ii) 17 December 2012 cyclone Evans claims:

Location	Amount Claimed	Date Lodged
Market Road, Nadi	$151,121.51	15/02/13
Yasawa St, Lautoka	$82,284.55	15/02/13
Main Street, Tavua	$51,644.54	15/02/13
Total	**$285,050.60**	

[07] The dispute between the parties was whether the two policies cover "losses" or "events" occurring during the period of cover. The Plaintiff says that the policies covered "losses" at each insured premises up to a limit of $150,000.00. Therefore 3 separate losses were suffered from the floods and 3 separate losses were suffered from Cyclone Evans, all totalling $789,264.44. On the other hand, the Defendant says that the policies covered "events" and so it would only pay one sum of $150,000.00 (less excess of $1500) for all 3 floods claims and one sum of $150,000.00 for all 3 Cyclone Evans Claims.

[08] The Defendant has admitted liability for $298,500.00 for the two claims. The defendant has also offered to pay that sum but only if the Plaintiff signs a final discharge in full settlement of all liability arising out of the flood and cyclone claims.

[09] According to the plaintiff, If the Plaintiff signs such discharge it cannot pursue its claim for the interpretation of the policies on whether the policies cover "losses" or "events" and would be irreparably prejudiced. The Defendant, on the other hand, will not suffer any prejudice by paying the admitted sum now and defending the balance claim. If the Defendant's interpretation is held to be correct then it will have nothing further to pay and will be compensated by costs.

The issue

[10] Two points of law arose in these proceedings:

(i) Is summary judgment available for the admitted sum when there are other related claims for determination at trial?

(ii) Can the defendant insist on a Final Discharge as a precondition to payment of the admitted sum?

The Law and the principles relating to summary judgment

[11] The Plaintiff may, under HCR O.14 r.1, apply for summary judgment against the Defendant on the ground that the Defendant has no defence to a claim. HCR O.14 deals with summary judgment. O.14 r.1 provides that:

> *"1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may,* ***on the ground that that defendant has no defence to a claim included in the writ****, or particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant.*
> *(2) ...*
> *(3) ... (Emphasis added).*

[12] Pursuant to HCR O. 14 r.3 the Plaintiff may obtain judgment against the Defendant on the claim or part as may be just. O.14 r.3 states that:

> *"3.-(1)* ***Unless*** *on the hearing of an application under rule 1, either the Court dismisses the application or* ***the defendant satisfies the Court with respect to the claim or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried*** *or there ought for some other reasons to be a trial of that claim or part,* ***the Court may give such judgment for the plaintiff against that defendant on that claim or part*** *as may be just having regard to the nature of the remedy or relief claimed"* (Emphasis added).

[13] **Fiji Court Appeal in Carpenters Fiji Ltd v Joes Farm Produce Ltd** [2006] FJCA 60; ABU00 19U.2006S (10 November 2006), a case frequently cited almost by both parties in summary judgment application, laid down the well-established principles in relation to the entry of summary judgment under para 21 as follows:

(a) "The purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a ***bona fide*** *defence or raise an issue against the claim which ought to be tried.*

(b) The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.

(c) It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.

(d) Set off, which is a monetary cross claim for a debt due from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it ***Hanak v Green*** *(1958) 2 QB 9 at page 29 per Sellers LJ.*

(e) Likewise where a defendant sets up a ***bona fide*** *counter claim arising out of the same subject matter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be for unconditional leave to defend even if the defendant admits whole or part of the claim.* ***Morgan and Son Ltd –v- Martin Johnson Co*** *(1949) I K 107(CA).*

See 1991 The Supreme Practice Vol 1 especially at pages 146, 147, 152 and 322."

Parties' contention

[14] On behalf of the plaintiff Mr Patel contended that, summary judgment is available to the plaintiff for the admitted sum because the defendant has no defence to such sum. The defendant cannot insist

on a final discharge in full settlement as precondition to payment, especially when the plaintiff wishes to pursue its other related claims at trial. He went on to argue that these were straightforward claims arising from floods and cyclone Evans. The defendant's loss adjuster should have known on his first inspection that the loss was more than $150,000 for each 'event'. The defendant had failed to make progress payment. In the absence of explanation, the defendant cannot justify a later date for interest to start than the dates now claimed.

[15] Mr Pillai, on behalf of the defendant argued and submitted that, the plaintiff cannot rely on documents exchanged during bona fide negotiations between the plaintiff, the plaintiff's insurance brokers and the defendant with an attempt to settle a dispute out of a policy. Those documents, he argued, are inadmissible as evidence as it is 'without prejudice' settlement negotiations. He also submitted that, the cause of action is solely based on the policy. By the plaintiff's own admission the policy that is relied on as the basis of the claim does not cover the 30th March 2012 floods. Order 14, r.1 is quite specific in that summary judgment can only be sought 'on the ground that the defendant has no defence to a claim included in the writ'. The contractual cause of action that gives rise to this particular claim is not included in the writ.

Determination

[16] By writ of summons filed on 9 January 2014 the plaintiff brought action against the defendant seeking, inter alia, judgment in the sum of $789,264.44 or for so much thereof as is found due and payable by the defendant plus interest. The plaintiff claim arose out of an insurance policy with the defendant.

[17] On 29 January 2014 the defendant filed acknowledgement of service and notice of intention to contest the proceedings.

[18] On the following day, 30 January 2014 the plaintiff filed the application for summary judgment in the total sum of the $298,500

which includes $148,500 for flood claim (i.e. $150,000 less excess of $1,500) plus $150,000 for the cyclone Evans claim (for full breakdown look at para 6 above), being the admitted sum.

[19] Pursuant of Ord. 14, r.1 (1) of the HCR, Where a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may**, on the ground that that defendant has no defence to a claim included in the writ, or particular part of such a claim**, apply to the court for summary judgment against that defendant.

[20] In this case the writ of summons has been served and the defendant has given notice of intention to defend the action. The plaintiff therefore is entitled, pursuant to Ord.14, to apply for summary judgment against the defendant. It is to be noted that the plaintiff need not wait for the defendant to file a statement of defence to make the application for summary judgment.

[21] The defendant resisting the summary judgment must establish that there is an issue or question in dispute with respect to the claim or the part of the claim which ought to be tried or there ought for some reasons to be a trial of that claim or part. If the defendant fails to do so, then the court will enter summary judgment against the defendant on that claim or part pursuant to Ord. 14, r.3 of the HCR.

Summary Judgment on admitted sum

[22] First of all let me decide on the issue as to whether summary judgment is available to the plaintiff.

[23] Ord.14, r. 1 applies to every action begun by writ other than-(a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment, (b) an action which includes a claim by the plaintiff based on an allegation of fraud. This order (Ord.14) will not also apply to action to which Ord.86 (Actions for Specific Performance-Summary Judgment) applies; see Ord. 14, r.

1.-(2) & (3), the HCR. None of these exceptions applies to the present case.

[24] The plaintiff had a valid Material Damage and Business Interruption insurance policy ("the policy") with the defendant for its 14 stores. The policy, inter alia, insured loss and damage at any store to refrigerated goods resulting from power failure caused by floods and cyclones. On 30 March 2012 the refrigerated goods in the plaintiff's three stores in Nadi and Ba were damaged as a result of power failure caused by floods of that day. On 01 May 2012 the plaintiff lodged the claims for the 30 March 2012 damage (for breakdown of the claim see para 6). On 17 December 2012 the refrigerated goods in the plaintiff's three stores in Nadi, Lautoka and Tavua were damaged as a result of power failure caused by Cyclone Evans of that day. The claims for these damages were lodged on 15 February 2013. The total claims the plaintiff made was $789,264.44.

[25] There was no dispute that these damages were occurred during the currency of the policy. The periods of insurance were 22 April 2011 to 22 April 2012 and 22 April 2012 to 22 April 2013.

[26] Under para 7 of the supporting affidavit the plaintiff states that the defendant has admitted the claims but to date had made no progress claim payment to the plaintiff despite several requests by the plaintiff and the plaintiff's broker, AON (Fiji) Ltd. In response to this, the defendant under 9 of the opposing affidavit states that, I deny paragraph 7 (of the supporting affidavit) and say that the defendant has not and does not admit anything with respect to the claims as stated in paragraph 6 and 7 of the affidavit.

[27] The defendant nevertheless in para 10 of the opposing affidavit states that, the defendant has offered to pay the plaintiff $150,000.00 which is the total policy limit for any claim for refrigerated goods payable upon the plaintiff signing a full and final discharge of all claims. The plaintiff made claims for two events namely the flood and cyclone related refrigerated goods claims. The defendant offered and/or

admitted to pay the plaintiff $150,000 for each claim totalling $300,000.00. The plaintiff complains that the defendant has failed to pay the plaintiff the flood and the cyclone related refrigerated goods claims, at least the admitted amount of $300,000.00, being a part of the claim.

[28] In the affidavit of opposition the defendant, as a defence to the claim, states that, the defendant's defence rests on judicial interpretation of the policy as to whether there was one loss or separate losses.

[29] Moreover, the defendant at hearing submitted that the documents at annexure "A-1", "A-2", "B-1" and "B2" of the supporting affidavit is evidence of bona fide negotiations between the plaintiff, the plaintiff's insurance brokers and the defendant with an attempt to settle a dispute arising out of policy. As such those documents are inadmissible as evidence as it is "without prejudice" settlement negotiations.

[30] Email correspondences ("A-1-"B-2") had taken place between the parties in respect of the plaintiff's claim. In that correspondence the defendant had offered to settle the plaintiff's entire claim for $300,000.00. The defendant, in these proceedings, contended that these documents cannot be relied upon by the plaintiff as they are privileged documents. The email correspondences cannot be considered to be privileged documents. There is nothing to suggest that the parties ever intended the email correspondences to be privileged matters. I therefore reject as untenable the contention advanced by the defendant that the email correspondences the parties had are privileged documents.

[31] There was another contention by the defendant that the plaintiff has failed to plead the "Policy No. 1124/10062994/000/00" or "Policy No.1124/100152505/001/01" in the claim. The plaintiff does not rely on either of the policies in the claim. And, it was further argued that

Ord.14, r.1 is quite specific in that summary judgment can only be sought "on the ground that the defendant has no defence to a **claim included in the writ**".

[32] The plaintiff seeks Judgment against the defendant in the sum of $789,264.44 or for so much thereof as is found due and payable by the defendant and Consequential damages resulting from breach of the insurance contract as pleaded in paragraph 10 [to be quantified at the trial].

[33] Para 10 of the statement of claim states that, the plaintiff has suffered, and continues to suffer, consequential damages resulting from the defendant's breach of insurance contract in failing to make progress claim payments and in delaying settlement of the insurance claim.

[34] Policy No. 1121/10015205/001/01 has been mentioned in the statement of claim. That policy has a Placement Slip, which has no number. But it covers refrigerated goods- limited to any one loss up to $150,000 (section 1). The plaintiff's store at Lodhia St, Nadi, one of the stores that suffered damage in the refrigerated goods due to power failure caused by flood is included in the Schedule of locations/sums insured. It will be noted that the plaintiff claims damages for the loss suffered in the refrigerated goods at various stores as a result of power failure caused by floods on 30 March 2012 and by cyclone Evans on 17 December 2012. The policy number has been stated in the statement of claim and that must be read with the Placing Slip. Therefore the argument that the plaintiff failed to plead the policy number is baseless. The plaintiff in fact relies on the policy coupled with the Placement Slip.

[35] The plaintiff claims damages for the loss incurred due to power failure caused by the flood and the cyclone Evans. The total claim is $789,264.44 or for so much thereof as is found due and payable by the defendant. The defendant had admitted to settle the claim for

$300,000 in full and final settlement of the claim. In these proceedings the plaintiff seeks summary judgment on the admitted amount. Pursuant to Ord.14 the plaintiff may apply for summary judgment on the ground that that defendant has no defence to a claim included in the writ, or particular part of such a claim. The plaintiff applied for the summary judgment in respect of the admitted amount, which is part of the plaintiff claim included in the writ. Hence the contention that the contractual cause of action that gives rise to this particular claim is not included in the writ has no legal basis. Clearly, the plaintiff seeks summary judgment for the admitted sum, which is included in the writ.

[36] The purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried, see **Carpenter Fiji Ltd** (supra). In the present case, undoubtedly in my judgment the defendant could not set up a bona fide defence or raise an issue in respect of the admitted sum.

[37] **In Footwear Manufacturers Ltd v New India Assurance Co Ltd** [1998] 44 FLR 215 (Suva High Court Action No. 564 of 1997), summary judgment was entered against New India for the admitted sum with interest and costs.

[38] The defence raised by the defendant in the present case that the policy needs judicial interpretation as to whether the policy covers losses or events has no application to the admitted sum. That defence may be relevant to the rest of the plaintiff's claim. Entering summary judgment will not affect the defendants defence in respect of the remaining claim. That defence will be still available to the defendant in respect of the remaining claim.

[39] I would therefore conclude that the plaintiff is entitled to summary judgment for the admitted sum despite the defence that the policy needs judicial interpretation as that defence has no application to the

admitted sum. Any dispute or difference concerning the balance of the plaintiff's claim may be resolved through mediation or by court.

[40] Now I turn to the issue whether the defendant is entitled to insist on a Final Discharge as a precondition to payment of the admitted sum. The defendant agreed to settle the claim for $300,000 upon the plaintiff signing the discharge in full and final settlement, which the plaintiff refused to do. The plaintiff wanted to pursue its other related claims at trial.

[41] A similar issue was raised in **New India Assurance Co. Ltd v Downtown Holdings Ltd** (Unreported, FCA 98 & 99 of 1985, delivered on 18/7/86). In that case Fiji Court of Appeal said:

> ***"... All it had to do was admit liability confirm the settlement and make payment. It cannot successfully claim to have an absolute right to a discharge in its own form addind nothing to the already existing situation in the absence of a specific provision to this effect in the policy.***
>
> ***We do not consider that the addition of the reservation of the right to claim interest for late payment affected the issue. The appellant should have tendered payment."***

[42] Moreover, in relation to discharge for policy monies. **McGillivray on Insurance Law** (12th Ed, 2013) states at para 25-033 (785):

> "A legal discharge means that the person to whom the money is paid has a legal and not just an equitable title to it. The company is obliged to pay out to the claimant upon the production to it of such evidence as does or ought reasonably to satisfy it that he is entitled at law to the policy moneys. In this respect the obligations of an insurance company do not differ from that of any other debtor. **It is not entitled to insist on any formal discharge from the claimant as a precondition to payment; and whilst it may ask for a receipt, the refusal to give a receipt does not justify the company in withholding payment.**

[43] From the above authorities it is clear that the defendant cannot insist a final discharge in full as precondition for payment of the agreed sum. The defendant should have made the payment of the admitted sum reserving their right to dispute the rest of the claim, instead of imposing a precondition to payment of the agreed sum.

[44] For the above stated reasons, I would answer the issue-1affirmatively and issue-2 negatively.

Interest

[45] The plaintiff claims interest on the judgment sum at 10% per annum compounded pursuant to s.34 of the Insurance Law Reform Act 1996 calculated on $148,500.00 from 1 June 2012 to the date of payment and on $150,000.00 from 15 March 2013 to date of payment.

[46] Since the plaintiff claims damages for the loss under a contract of insurance, the defendant is also liable to pay interest on the amount in accordance with the provisions of section 34 of the Insurance Law Reform Act 1996, which states:

> *"34. – (1) Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this Section.*
>
> *(2) the period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount and ending on whichever is earlier of the following days:*
>
> *(a) the day on which the payment is made;*
>
> *(b) the day on which the payment is sent by post to the person to whom it is payable.*
>
> *(3) The rate at which interest is payable in respect of a day included in the period referred to in sub-section (2) is the rate that is prescribed by regulation."*

[47] The interest rate under s. 34(3) is prescribed by Insurance Law Reform (Interest Rates) Regulations 2004. The interest rate payable in respect of each day included in a period referred to in that section is 10% per annum. The interest rate set out is calculated from the commencement date and accrues on a daily basis up to the date of payment, see Regulation 2.

[48] For the flood claim the plaintiff claims interest from 1 June 2012. The damage due to flood to refrigerated goods occurred on 30 March 2012. The claim for that damage was lodged on 1 May 2012. And, the claim for the damage due to the cyclone Evans to refrigerated goods occurred on 17 December 2012. The claim for that damage was lodged on 15 February 2013.

[49] In **Protean (Holdings) Ltd & Ors v Home Assurance Co** (1986) 4 ANZ Insurance Cases 60-683, the court held that 2 months was a reasonable time for full and proper investigation and the insurer was in breach after that.

[50] In the present case the defendant was under obligation pursuant to the policy (p.20) to make progress claim payment, but failed to do so. The policy provided that where loss or damage has given rise to a valid claim on this policy, the Company will make progress claim payments on production of acceptable evidence of insured loss (in this case there was no dispute as to amount of loss). If the aggregate of progress claim payments exceeds the total amount of loss as finally adjusted, the insured will immediately refund the difference to the Company.

[51] The defendant refused to pay the agreed sum of $300,000. The defendant should not have imposed a precondition that the plaintiff should sign a full and final discharge form before making the payment. It was not open to the defendant to demand a discharge form signed by the plaintiff before the payment. Possibly, the defendant would have obtained a receipt for payment.

[52] In all the circumstances, it was unreasonable for the defendant to withhold payment longer than two months after the claim was lodged by the plaintiff. An award of interest at the rate of 10% per annum from that date (two months after the date lodged) to the date of payment would be justifiable. I accordingly award interest as follows:

(i) Interest to be calculated on $148,500.00 from 1 July 2012 to the date of payment. This reflexes claim for loss due to the 30 March 2012 floods. The claim for this loss was lodged on 1 May 2012.

(ii) Interest to be calculated on $150,000.00 from 15 April 2013 to the date of payment. This reflexes claim for loss due to the 17 December 2012 cyclone Evans. The claim for this loss was lodged on 15 February 2013.

Costs

[53] The plaintiff as a winning party is entitled to costs of these proceedings. Mr Patel in his written submission seeks summarily assessed costs. He did not suggest any amount. I therefore, taking all into my account, assess the costs at $1250.00 (including disbursements), which is to be paid in 21 days by the defendant to the plaintiff.

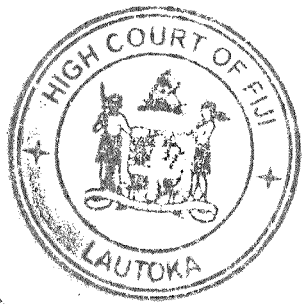
Final outcome

(a) Enter summary judgment in favour of the plaintiff in the sum of $298,500.00;

(b) The defendant will pay interest at the rate of 10% per annum compounded daily pursuant to s. 34 of the Insurance Law Reform Act 1996 calculated on $148,500.00 from 1 July 2012 to the date of payment and on 150,000.00 from 15 April 2013 to the date of payment;

(c) The defendant will also pay summarily assessed costs of $1250.00 to the plaintiff in 21 days of this judgment; and

(d) Orders accordingly.



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M H Mohamed Ajmeer

A/ Master of the High Court

At Lautoka

Messrs Young & Associates Solicitors for the plaintiff

Messrs Gordon & Co., Barristers & Solicitors for the defendant