IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 435 of 2005

BETWEEN : **PUNJA & SONS LIMITED** a limited liability company having its registered office at 63 Vitogo Parade, Lautoka carrying on business as manufacturer, importer and distributor of consumer goods.

FIRST PLAINTIFF

A N D : **OCEAN SOAPS LIMITED** a limited liability company having its registered office at 63 Vitogo Parade, Lautoka carrying on business as manufacturer and distributor of soaps.

SECOND PLAINTIFF

A N D : **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

Counsel	:	**Mr. B. C. Patel and Mr. C. B. Young for the Plaintiffs**
		Mr. F. Haniff and Mr. Tuitoga for the Defendant
Date of Hearing	:	**16th to 20th October, 2012 and 2nd April, 2013 to 12th April, 2013.**
Date of Decision	:	**24th March, 2016**

DECISION

INTRODUCTION

1. On 19 February 2003 the First Plaintiff's building at Lautoka was destroyed by fire. The Plaintiffs had insured it with the Defendant under Material Damage and Business Interruption insurance policy no. 922622/1112/12376/00 (herein after referred only as The Insurance Policy). The Defendant invoked '*malicious damage limitation*' under the

insurance policy and admitted liability for $3 million only for the material damage claim, but On 6 May 2011, Calanchini J. (as his lordship then was) in a split trial, held that the Defendant had failed to prove the malicious damage limitation and referred the matter for assessment of damages before the Master.

2. The matter was referred to me as the then Master of High Court to assess damages to the Plaintiffs claims. Due to several requests for adjournments, the matter could not be taken for assessment of the damages till 16th October, 2012. When it was taken for assessment it was not conclude during the allocated time and had to be adjourned. As the counsel were not available beyond the allocated time for the assessment hearing adjourned.

3. The matter continued before me on 2nd April, 2013. The continuation of assessment was before me as a judge of the High Court, and at that point, before the commencement of the adjourned hearing all **parties consented that this decision should be considered as Master of High Court.**

4. The liability of this case was heard by a judge, through a split trial, and referred to the Master for assessment and main part of the hearing was concluded before me as the Master.

5. The assessment of the damage involved interpretation of the Insurance Policy, and applicable law and interpretation of provisions of law and determination of best method for ascertainment of 'indemnity' value for different types of assets. The Insurance Policy was for the Material Damage (MD) and also for Business Interruption (BI).

6. The Plaintiffs and the Defendant had initially engaged in the process of ascertaining the loss through engaging professional Claim Preparer and Lost Adjuster, respectively. Though this process was not fully successful in resolving all the claims, it had resolved certain claims under the policy. The Defendant had made part payments subject to 3 million limitation under MD claim.

7. The involvement of specialist in the process of ascertainment of large claims like the present one was the usual practice and this process had taken some time. Both parties have submitted materials that were presented through this process.

8. My task here was different from the said process, though the final outcome was the assessment of the loss to the Plaintiffs under the Insurance Policy. The evidence produced by both parties needed to be proved under general civil burden of proof, the balance of probability.

9. I am not aware of the burden of proof before lost adjuster and the details of that process, but it seems an arrangement between the parties involving both parties engaging professional for the task. The process seemed less formal than even arbitration, regarding the rules of evidence and also burden of proof. As far as the claims that were accepted by the parties there were no issues but the other contested claims needed to be proved.

10. So, it was the task of the court to assess the remaining claims using rules relating civil burden of proof. I regret the delay in this matter. The burden of proof was with the Plaintiff for the claims that they made. The exception was the value for salvage where the Defendant sought to deduct salvage value from the claim.

11. The Plaintiff in the written submission contended that I should venture to find out whether the lost adjuster was reasonable (see paragraph 21 of the submission) in rejecting the Plaintiffs claims. I do not agree with that.

12. It was not my task to substitute myself as lost adjuster or as an adjudicator to said process. At the outset I reject that contention. The action before me was a Civil Action in the High Court and my task was to assess the damages to the Plaintiffs in terms of the Insurance Policy and applicable law.

13. The Insurance Policy was an indemnity Policy meaning that the compensation or reimbursement cannot exceed the value of the loss. The Insurance Policy states;

Material Damage and Business Interruption Policy

Policy Number: 922622/1112/12376/00

In consideration of the insured named in the Schedule having paid or promised to pay the required premium, the Company, ***agrees to indemnify the Insured as set out in the respective Sections of the Policy.***

Each Section of the Policy contains the terms of a separate contract *which, together with any general terms and particulars,* ***is to be interpreted as if issued as a separate policy.*** *Unless the context requires otherwise, the word "Policy" is to be interpreted accordingly.*

Section 1 – ***Material Damage – Indemnity***
Except as otherwise provided, the Company's Liability will not exceed the maximum liability as stated in the Schedule in respect of any one loss caused by an Insured Peril ***at anyone location.***

Section 2 – Business Interruption
Except as otherwise provided, the Company's liability will not exceed the Sum Insured; and if more than one Item is included in the Schedule forming part of this Policy, will not exceed in respect of each Item the Sum Insured applicable to that Item. (see page 1 of the Insurance Policy)(emphasis added)

14. In ***<u>McCann v Switzerland Insurance Australia Ltd</u>*** (2000) 203 CLR 579 at 589 after observing that, as a commercial contract, a policy of insurance should be given a businesslike interpretation, Gleeson CJ added:

> *"Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure".*

15. The Section 29 of the Insurance Law Reform Act, 1996 of Fiji states as follows,

> ***Notwithstanding any law or agreement to the contrary****, the following rules of construction shall be observed in the interpretation of any proposal for insurance or any policy of insurance or endorsement on a policy of insurance:*

(a) the intention of the parties, ascertained from the face of the documents, documents incorporated therewith and surrounding circumstances, shall prevail;

(b) the whole of a document shall be looked at and not a particular clause;

(c) written words shall ordinarily be given more effect than printed words;

(d) wherever possible, the grammatical construction shall be adopted, but the intention of the parties shall be of paramount consideration;

(e) words shall be construed in their plain, ordinary, popular, commonsense and natural meaning except that terms of art or technical words shall be understood in their strict, technical and proper sense unless the context controls or alters the meaning;

(f) the meaning of a word is to be ascertained with reference to its context and may be restricted or modified thereby, and where, from the context, it appears that the parties intended to use the word in a special and peculiar sense, and not in a meaning which it might otherwise bear, the word shall be construed in accordance with their intention;

(g) subject to the precise terms, subject matter and context of a clause, where specifications of particular things belonging to the same genus precede a word of general signification, the latter word of general signification, shall be confined in its meaning to things belonging to the same genus and shall not include things belonging to a different genus;

(h) where a word of general signification is followed by words of limitation or definition, which introduce words of narrower signification, the first word shall not be taken in its full sense but shall be construed as limited by and applying only to the particulars specified;

(i) words shall be construed to mean what they say, unless there is some strong ground for placing a different construction on the words from what they naturally import;

(j) words shall be construed liberally so as to give effect to the real intention of the parties and the document shall not be so construed as to defeat the object of the transaction or as to render it illusory;

(k) in any case of ambiguity, where words are capable of more than one construction, the reasonable construction shall be taken to represent the intention of the parties;

*(l) the language of a document shall not be strained in favour of or against any party but **if there is any ambiguity, the ambiguity shall be resolved in favour of the person insured;***

(m) every effort shall be made to reconcile inconsistencies, but where there is an inconsistency between the wording of a policy and that in the proposal or any earlier document, the policy shall be regarded as expressing the true intention of the parties in the absence of sufficient evidence to the contrary;

(n) an express term shall override any implied term inconsistent with it.
(emphasis added)

16. The provision contained in Section 29 of the Insurance Law Reform Act, 1996 of Fiji was applicable ***'Notwithstanding any law or agreement to the contrary'.*** So, to argue that this provision did not apply to a policy drafted by a broker cannot be accepted. The statutory regime prevails over, any law or agreement contrary to it.

17. There was no definition of what the indemnity value was for each and every component of the MD. There was no one particular method of calculation of indemnity value of an item that can be applied to all the components at all time. There were various methods to arrive at a value for an asset. There cannot be a fixed method that fits all the assets under all conditions. One particular asset will have different 'values' under different methods of valuation. The indemnity value was simply the value that can attach to its worth to the owner at a particular moment. So arriving at indemnity value to the assets in the MD claim the indemnity value was the value of those assets just before they got destroyed. This does not include any sentimental or specially attributed value to the owner, and it also disregards any unrealistic and artificial values.

18. It was not possible to have one method of calculation for different types of assets to ascertain a value for it. Even for the same asset under different conditions different methods could be utilized to arrive at indemnity value. What was important to arrive at was the value that closely resemble to its value before the fire, and this may not be necessarily the highest 'value' of the said property at all time. The value of an asset was a

relative thing that depends on many factors, hence to arrive at indemnity value was the value that closely resemble to it before the fire.

19. This was by no means an easy task as claimants always try to gain maximum from adopting different methods of valuations to arrive at indemnity value and insurers trying to minimize the claim. This may be the reason for engaging experts in the insurance field for claim preparation and adjustments, but there was inherent weakness in such process as each expert was representing a client and they were under instructions of the opposing parties with conflicting interests.

20. That may be one reason for impasse that resulted the process of calculation being stalled before finalization of all claims. Mr. Godfrey in his evidence stated that he was instructed by the Defendant to stop his professional work as a lost adjuster after some time as parties could not proceed further to resolve remaining claims by said process. There was no independent mediator to resolve the differences between the parties, identifying the interests, options and alternatives and to address them in professional independent manner. It was not a task left for me, at this hearing.

21. In ***Lucas v New Zealand Insurance Co Ltd*** (1983)2 ANZ Insurance Cases 60-506 at 77,876 Crockett J held, as follows:

> *"In determining the value of the property lost it must be borne in mind that it is not the value in an abstract sense that is to be assessed, but the value of the property to the insured. That is to say it is the insured's actual loss that is recoverable. See Canadian National Fire Insurance Co. v. Colonsay Hotel Co. (1923) 3 D.L.R. 1001. So, if the insured should have a house property on the market for sale at a stipulated price at the time of its destruction by fire then the 'real value' to the insured of the property, and so the measure of his loss, is that price (less the site value) and not the cost of its replacement: Leppard v. Excess Insurance Co. Ltd. (1979) 1 W.L.R. 512; (1979) 2 All E.R. 668. Or, should the insured of a house property be intending at the time of its being destroyed by fire in the near future to demolish the house in preparation for the development of the site, then the value of the house to the insured may be little more than the value of salvaged materials upon its demolition: Falcon Investments Corp. (N.Z.) Ltd. v., State Insurance General Manager (1975) 1 N.Z.L.R. 520. On the other hand, the*

property in question may have a value to the insured beyond the market value because it was held by him for the purpose of using and enjoying it as a house — see Bowen L.J. in Castellain v. Preston at p. 400 — or in carrying on his business: Grant v. Aetna Insurance Co. (1862) 15 Moo. 516 at pp. 518-519; 15 E.R. 589, where there is set out the direction, given to the jury the correctness of which in this connection was not challenged on appeal to the Privy Council. In such cases, the insured can be granted the full indemnity to which he is entitled only if there is such restoration as to permit his continued use and enjoyment of the property or its use in the carrying on of his business. The cost of reinstatement is the measure of indemnity in such circumstances even though that cost may be in excess of the market value.

It is often more likely that where the loss is partial only, then, indemnification will require payment of the cost of repairs. *Theoretically this cost should be the same as market value, but experience shows that this is rarely so — even if some allowance is made on the 'new for old' principle (which it is not suggested should be applied in this case). For the purpose of assessing the correct indemnity to be made the determination of whether a loss is total or partial is a question of fact. See Ivamy: Fire and Motor Insurance 3rd ed. pp. 164-169; Sutton: Insurance Law in Australia and New Zealand (1980) para. 15.64 and Elcock v. Thomson (1949) 2 K.B. 755 at p. 764."*

22. The general principles applicable when assessing indemnity was found in ***Castellain v Preston*** (1883) 11 Q.B.D. 380 Brett LJ at page 386:

> *"The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong."*

23. In Halsbury's Laws of England, 4th Edition Reissue, Vol.25, the following is said about the principle of indemnity:

> *3. The Principle of indemnity*

> *"Most contracts of insurance belong to the general category of contracts of indemnity in the sense that the insurer's liability is limited to the actual loss which is, in fact, proved. The happening of the event does not of itself entitle the assured to payment of the sum stipulated in the policy; the even must, in fact, result in a pecuniary loss to the assured, who then becomes entitled to be indemnified subject to the limitations of his contract. He cannot recover more than the sum insured, for that sum is all that he has stipulated for by his premiums and it fixes the maximum liability of the insurers. Even within that limit, however, he cannot recover more than what he establishes to be the actual amount of his loss. The contract being one of indemnity, and of indemnity only, he can recover the actual amount of his loss and no more, whatever may have been his estimate of what his loss would be likely to be, and whatever the premiums he may have paid, calculated on the basis of that estimate."*

24. In ***British Traders Insurance Company Ltd v Monson*** *and Another* (1964) 111 CLR 86 Windeyer J.at page 104 said :

> *"But, because an insurance contract is a contract of indemnity, the amount recoverable under the policy could not exceed the sum necessary to indemnify the Monsons against the loss actually sustained by them in consequence of the fire. An assured is not entitled to recover the amount specified in the policy unless it represents his actual loss. The amount specified fixes only the maximum liability of the insurer under the policy. I need not cite authority for these propositions. I have had the advantage of reading the judgments of the other members of the Court, and to what they have said on this aspect I cannot usefully add anything. "*

25. In ***British Traders Insurance Company Ltd*** (Supra), Kitto, Taylor and Owen JJ held at pages 92 and 93:

> *"All its provisions, even the very words that are relied upon for their literal meaning, are characteristic of fire insurance policies. It is far too late to doubt that by the common understanding of business men and lawyers alike the nature of such a policy controls its obligation, implying conclusively that its statement of the amount which the insurer promises to pay merely fixes the maximum amount which in any event he may have to pay, and having as its sole purpose, and therefore imposing as its only obligation, the indemnification of the insured, up to the amount of the insurance, against loss from the accepted risk. Brett L.J. in Castellain v. Preston (1883) 11 QBD 380, at p 386 said that the contract "means" that the assured, in case of a loss against which*

> *the policy has been made, shall be fully indemnified, but* ***shall never be more than fully indemnified.*** "(underling is mine)

26. While assessing damages on indemnity basis, the court should never assess more than the fully indemnity value. This was the danger that the court should be mindful in adopting different costing methods presented to the court by parties, without explaining them or without presenting pros and cons of such methods of valuations.

27. The method that closely resemble to the indemnity value, of the particular claim or item, should be considered as the indemnity value. In most cases the actual or real indemnity value is difficult to assess. For an example, if a brand new motor car on sale, before registration got destroyed due to a fire the indemnity value can be ascertained, but if it was registered and used and not on sale it would not be that easy to ascertain the indemnity value, though there are methods to find valuation using various costing or valuation methods. One popular method would be the commercial price, but there will also be depreciated value or book value for the said motor vehicle. When there are no other comparable item to the one that got destroyed, in the country or perhaps in the region, as plant and machinery, it would be difficult to ascertain commercial value for the destroyed item. It would be difficult to ascertain depreciated or book value of the item if it was used for more than its usual life time. In such circumstances a price of a comparable plant or machinery with any adjustments (like transportation, installation etc) would be the indemnity value.

28. In referring to Cotton L.J's judgment in ***Castellain v Preston*** (1883) 11 QBD, Kitto, Taylor and Owen JJ in *British Traders Insurance Company Ltd* (Supra) (Tab 3) said at page 94 and 95 that:

> *"The policy", as Cotton L.J. said, "is really a contract to indemnify the person insured for the loss which he has sustained . . . and from that it follows, of course, that as it is only a contract of indemnity it is only to pay that loss which the assured may have sustained . . ."*

29. The different methods of valuation of same property would undoubtedly leads to different values. Even a same property could under different circumstances would have different

indemnity values. This phenomenon had raised some issues relating to assessment of indemnity value for a property. This becomes even more complex in a claim like the present one where different types of assets were destroyed and some assets like the Toilet Soap Line had its main components as old as 1969 and there were no comparable machine to ascertain the value (commercial value) even in the pacific region including Australia and New Zealand. One obvious reason was the age of the said machinery being 1969 and technology had advanced drastically since then prompting replacement of old machines by users of that type of machine for efficiency and other factors (eg automation) . The manufacturer was not producing 1969 machines without modifications for over 30 years. The other reason was the stiff competition in the industry and fear of competitor getting hands to their used machinery, prevented quoting a price for such machinery even in second hand market in the region.

30. It is noteworthy to refer to ***Leppard v Excess Insurance Co Ltd*** [1979] 2 All ER 668 at 676 Geoffrey Lane LJ Held,

> *'But it is clear, with great respect to the judge, that by awarding the sum that he did to the plaintiff, the plaintiff is undoubtedly £5,000 or so better off than if he had succeeded in achieving his ambition of selling this cottage for £4,500 or £4,000. That means, in short, that he has received more than an indemnity against his loss. He has had a bonus; and this policy does not provide for him to have such a bonus. This is an indemnity policy: it entitles him to the amount of his loss, and no more.*

31. It was a house on sale shortly before the fire and the owner was willing to sell it for £4,500 or £4,000. So the **indemnity value of the house was not replacement cost** or the **depreciated cost**, but **the price that the owner was expecting to sell** at the time. The replacement costs would be more and depreciated value may also be different but the indemnity value in that instance was the intended sale price and no more. The owner cannot ask the insurer to replace the house or the cost of replacement as the indemnity value. This cannot be applied to all situations all the time. The circumstances needed to be considered in the determination of indemnity value.

32. In summary, the Plaintiff cannot have a bonus due to the adoption of certain method of assessment, merely because it gives a higher value. The indemnity value is the worth of the property lost before the peril that destroyed the asset. The method of valuation should not be to arrive at the value that is hypothetical or artificial under the circumstances. It should always be a realistic value of the property shortly before the fire.

Plaintiff to prove the Extent of the Loss

33. In ***Nand v Dominion Insurance Ltd*** [2000] FJHC 167; HBC57.1996 (decided on 30 June 2000) (unreported) Justice Pathik said that *"the Plaintiff has to prove the extent of his loss."* The burden of proof in a civil action is with the Plaintiff and the assessment of loss needs to be proved by the Plaintiff.

34. Even within the limit specified in the Policy, the Plaintiff cannot recover more than what is established to be the actual amount of the loss:

    (i) ***Chapman v Pole PO*** (1870) 22 LT 306 at 307

    (ii) ***Richard Aubrey Film Productions Ltd v Graham*** [1960] 2 Lloyd's Rep 101

35. In ***British Traders Insurance Company Ltd v Monson and Another*** (1964) 111 CLR 86 Menzies J at pages 98 and 99 said:

    "....and he cannot recover even the sum insured, unless he proves a loss to that amount".

36. In ***Lake v Hartford Fire Insurance Co. Ltd*** [1966] W.A.R 161 Justice Jackson at page 168 said:

    "It was for the plaintiff to prove the amount of the loss, and he is not excused from failure to do this by having proceeded for a larger amount on untenable grounds."

37. The submissions of the Plaintiff devoted much attention on the applicability of ***Brown v Dunne*** *(1893) 6 R 67 (HL)*, principle. Cross on Evidence[1] address the issue as follows.

> *'EVA92.5 **The duty to "put the case" - common law***
> *At common law counsel had a duty to "put the case" of his or her client to the witnesses called by opposing counsel. Whenever it was proposed to ask the tribunal of fact to disbelieve the evidence-in-chief of the witness presently in the box, that contradictory material, or at least the essence of it, normally had to be put to the witness so that he or she might have an opportunity of explaining the contradiction.[2] Failure to do so might be held to imply acceptance of the evidence-in-chief.[3]*
>
> *To comply with the rule counsel had to put to each of the opponent's witnesses, in turn, so much of counsel's own case as concerned that particular witness, or in which that witness had had any share.[4] But the particular circumstances of a trial sometimes justified a relaxation of the rule.[5] The respects in which his or her evidence would not be accepted had to be indicated to the witness.[6]'*

38. Considering the above quotation from the text on Evidence, to my mind there was no violation of the said rule in the evidence. The Plaintiff knew that all the disputed claims

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[1] Cross on Evidence (NZ)/Evidence Act 2006/EVIDENCE ACT 2006/Part 3 Trial process EVA 92.5

[2] ***Browne** v **Dunn** (1893) 6 R 67 (HL); R v Hart (1932) 23 Cr App R 202, applied in R v Auckram (CA 282/07, 12 December 2007); [2007] NZCA 570 (BC200763296); Transport Ministry v Garry [1973] 1 NZLR 120. See also Perry v R (1982) 150 CLR 580. R v Manunta (1990) 54 SASR 17 contains a survey of the "rule in **Browne** v **Dunn**". See also Goldberg J's discussion in White v Flower and Hart (1998) 156 ALR 169 (FCA).The reasoning in R v Hart could not apply to an accused whose defence is an outright denial, and the prosecution has no duty to afford such an accused further opportunity to establish his credibility: Crime Appeal (CA 273/91) (CA 273/91, 20 December 1991). See also R v Dewar (CA 547/07, 5 September 2008); [2008] NZCA 344. Mahoney [2004] NZ Law Review 313 argued against a comprehensive duty to put the case. For a helpful review of the common law authorities see Kennedy v Kennedy [2007] DCR 507 (BC200760112).*

[3] ***Browne** v **Dunn** (1893) 6 R 67 (HL), 76-77 (unless the witness has had notice of non-acceptance beforehand, or the story is itself of an incredible or romancing character). See O'Connell v Adams [1973] RTR 150, 154. Notice may have been given by the conduct of the trial, in which event there is no obligation to cross-examine: Hewinson v Police (1987) 3 CRNZ 27. It is not ordinarily necessary to put to a party matters which are clearly at issue: Stern v National Australia Bank Ltd (2000) 171 ALR 192 (FCA). The mere exchange of briefs does not, without more, amount to "full notice beforehand": Pain Management Systems v McCallum (2002) 16 PRNZ 227, 258 per Penlington J.*

[4] *Reid v Kerr (1974) 9 SASR 367; R v Byczko (No 2) (1977) 17 SASR 460; and see discussion by Bray J in Thomas v van den Yssel (1976) 14 SASR 205 and, particularly, Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1, 16, per Hunt J. See also R v Webber [2004] 1 All ER 770 (HL), 785 ("where counsel is instructed to put a positive case").*

[5] *See Phipson, Law of Evidence, 14th ed, para 12-13.*

[6] *R v Fenlon (1980) 71 Cr App R 307, 313 (no different rule as to defendants between themselves).*

and also the disputed amounts and what the Defendant relied to substantiate their allocation (adjusted figures) even at the time of the determination of the liability in split trial.

39. The Plaintiff cannot rely on the ***Brown v Dunne*** (supra), without proof of their claim at the hearing on the civil burden of proof.

40. The Defendant did not deny their obligation to pay under the Insurance Policy. The issue was relating to the amount. Under MD Defendant had accepted liability under all the headings presented to the court, but their assessment of damage was different from the Plaintiffs'.

Office and laboratory plant and contents

41. The parties are in agreement that the Plaintiff's claimed figure of **$178,031.00** be accepted. There is no dispute on this amount at the hearing of the assessment.

Minor Lines

42. The Minor Lines consisted plant and contents in the soap pressing and wrapping departments, and in the deodorant rooms.

43. The Plaintiff presented a claim for $35,138.00. The Defendant's witness Mr. Godfrey as a loss adjuster, adjusted the Minor Lines claim to be $26,522.00.The parties agreed the differences was not material, arriving at an agreed adjustment of $30,830.00. The parties have agreed on a compromised amount of **$30,830.00** and therefore there is no need for assessment of the said claim at this hearing.

Toilet Soap Line

44. The toilet soap line was used by the Plaintiff to manufacture toilet soap.It was accepted by both parties that the soap making machineries involved in the said soap line were destroyed. Though there were some parts that were left after the fire both parties agree

that cost of said toilet soap line was recoverable under the insurance policy on indemnity basis.

45. To determine indemnity value of the said plant can be decided by using a similar or comparable toilet soap line. In order to find out a similar plant it should be of the same age and or same type (model) of machines and also comparable functionalities.

46. The issue was that there was no comparable plant line in Fiji. The main components of the machine were made in 1969. The main components were made of MM (Meccaniche Moderne) a reputed manufacturer in the industry.

47. The presented, adjusted and the amount in dispute for the Toilet Soap Line claim was as follows: (The adjusted value denoted the value the Defendant offered)

Presented	Adjusted	Dispute
$1,424,235.00	$855,764.00	$568,471.00

48. Marchants, production line procurement consultants in the United Kingdom, quoted a price of £ 125,000 for the toilet soap line.

49. There was no dispute as to the said line being considered as a possible replacement of the toilet soap line destroyed. There was no evidence presented by the Plaintiff to say that soap line was made of cheaper or low quality machines to the Plaintiffs' one that was destroyed.

50. The parties had no dispute as to the cost of shipping and installing the line to the site.

51. The only difference was that Plaintiff sought a refurbishment for the said line, on the basis that there was no warranty on the components. This was rejected by the Defendant stating that it was the toilet soap line that closely resemble to the destroyed one, and also it was ready for sale. The production in the said plant had

decommissioned. The Defendant state that they were required to pay on the indemnity value of the plant destroyed and refurbishments were a 'bonus' to the Plaintiff.

52. The said toilet soap line and it was on sale at the time when parties were searching for a plant and it was owned by a multinational soap manufacturer. At the time of the fire it was working and it had worked for 3 more months before as decision was taken for scaling down the production in that country.

53. Additionally the Defendant also offered a risk contingency of FJ$250,000 for the said plant considering it had worked in a different environment and transportation and other risks. So, apart from the price said contingency was also added.

54. Mr. Godfrey explained in his evidence that the Oceania marketplace was very small, with few soap plants in this region, making establishment of insurance settlement value by market pricing somewhat unreliable and also not pragmatic.

55. He therefore sought the value of soap line by identifying comparable machinery and the cost to install it on site in working order. This can be considered as the indemnity value of the said item due to several reasons. The toilet soap line that got destroyed had several components and all were of not one particular model or brand, this would have added to the costs in the maintenance and also for inventory for the parts in such a production line. It could also affect the production efficiency as the least efficient component would determine the total efficiency in such a production line.

56. The Plaintiffs' destroyed toiled soap line consisted of the major plant items:

(a) Meccaniche Moderne (MM) Preliminary Plodder Model 1/20O/B – 1969
(b) MM Secondary Plodder Model 1/250 – 1969
(c) MM Model SADE/250 Roller mill – age unknown
(d) MM Soap Plodder Model 2/250/S – 1969
(e) Sheng Shung Plodder Model SS-29 – 1982
(f) MM Soap Cutter Model TGV/V – 1969
(g) Soak Press – RMT6VSG – age unknown
(h) Senica Microlynx Wrapping Machine – age unknown (relatively new)
(i) Fuji Packing Machine – age unknown but relatively new
(j) Jacketed Pan, valve sets, cooling systems, water systems and conveyors

57. The destroyed Toilet Soap Line consisted of five different manufacturers. So it was not exclusively made out of MM components. MM was a reputed manufacturer in the field. Except the components (a), (b), (d) and (f) all made in 1969 and also (e) made in 1982 the age of the other components were not known. The components (e), (g), (h), (i), and (j) were not MM.

58. The Defendants sought for second hand equipment in the international market to use as the basis for indemnity valuation of the destroyed line. There was none available in New Zealand or Australia. According to the unchallenged evidence, one line in New Zealand was unused, but the owner would not discuss sale, stating clearly that it could end up in the hands of a competitor in the same market. This was also one reason for not selling of wreckage in the local market as it could be repaired and ended up in the hands of a rival, affecting the relatively small Fiji market for the industry.

59. The Defendant searched outside Oceania for an available plant that would be no older than the Plaintiffs' plant, and have at least the same capacity as theirs. The Plaintiff could not find a comparable plant and were willing to purchase, if refurbishments quoted by them were done.

60. Mr.Godfrey was able to secure the services of (Marchants), a procumbent consultants, in the field, to advise on the sourcing of equivalent second-hand machinery. They provided the full specifications of the toilet soap production line that could be considered as a comparable for ascertaining indemnity value. In fact this machine was newer and had more capacity and consisted of only two reputed makes in the industry components.

61. The said consultants, found two working toilet soap production lines it could secure that met overall specifications of the Plaintiffs' Line. One such line was located in London, and for a variety of reasons was not considered, but the second one was considered.

62. The second line was in Prague, Czechoslovakia and had a net capacity of 1,500kg per hour, its components were made largely from 1980, and was immediately available for sale at the time of the enquiry.

63. This line also had the advantage that its immediate prior use was by a major global soap manufacturer, Unilever, and it was in working order 3 months after the fire. The evidence was that the said Plant was in use after the fire that destroyed the Plaintiffs' toilet soap plant. There was no evidence of any issue raised by the Plaintiffs relating to said plant being idle for a long time, as contended in the written submission. If that was a concern it would have been raised at that time and there was no evidence.

64. In the absence of any major defect in the line this could be considered as comparable for indemnity value, but the installation costs needed to be added. Apart from this the Defendant was agreeable to an additional allocation of contingency for the said production line.

65. This soap line was relatively newer than the one that got destroyed and also had slightly increased capacity. It would be futile to look for identical toilet soap line that got destroyed as it comprised of more than 10 components and makes of those 10 components were not from the same manufacturer. Mainly, it consisted of MM components made in 1969 (about 5 components) but the others were of some unknown make and age and, also of makes of lesser reputation than MM.

66. The Plaintiff's witnesses always emphasised on the quality of MM in the field of soap manufacturing machinery, but failed to explain why they did opt to these other brands of components in the toilet soap line. Nothing was mentioned about the quality of these different brands and components and some components did not indicate how old they were. All the MM components in Plaintiffs Plant were made in 1969 but the age of other components range from 1982 to relatively new, but there was no evidence of the reputation of these non MM components and their life time or any excising or expired warranty for the components.

67. The usual warranty of the MM components have expired, long time ago as they were made in 1969. The plant and machinery were normally depreciated for accounting purposes using various methods, and there was no evidence produced by the Plaintiffs relating to the 'book value' of the main components made in 1969 (MM components) or the other components. Even MM components (made 1969) were constantly used and maintained hence an extended life time for said components were possible and they were in working condition at the time of the fire.

68. The evidence was that even MM components (1969) were used beyond their usual life time and this was possible due to maintenance and quality of the MM components, a fact that was not disputed in evidence. Even the best quality components will not last forever and has a life time of its own though they can extend time period than the usual one.

69. The toilet soap line found in Prague had additional automated features that the Plaintiff's line did not, and could perform all of the insured's toilet soap production features without being broken up to reconnect other items of plant, whereas the Plaintiff's line did require breaking to make different types of toilet soap. This was an improvement than the destroyed one, as production line requirements can be changed more quickly, achieving better production efficiency. Though used as a comparable, due to non availability of 1969 partly MM plant on sale, it would have been a better machinery than the one that destroyed if one considers only the plant features.

70. The Prague Line was made up of the following primary components:

(a) Mazzoni B-300/3500 Duplex Mixer Refiner
(b) Webber and Seelander 1200 Roll Mill
(c) Mazzoni 300/2500 Duplex Vacuum Plodder
(d) Mazzoni TV Rotary Cutter
(e) Mazzoni STUD Duplo Universal Stamper
(f) Carle Montenari CMP 22 Universal Toilet Soap Wrapper

71. The above toilet soap manufacturing line included all of the interconnecting conveyors and soap flow regulation system that would make up a substantial part of the system for this item. So the line mainly consisted of 'Mazzoni' and 'Webber' components and there

was no dispute as to their reputation in the industry and were comparables to MM. In fact two of the Plaintiff's Directors visited Prague and examined the plant and was shown a video of the plant when it was working. It was decommissioned and parts removed for sale when they visited. None of the directors raised the issue of the components and their functions not being comparable, but they desired a warranty for the components and for that they sought refurbishment from Merchants.

72. The quotation for the said refurbishments were also obtained from the same consultants that the Defendant employed to find the said plant. No issue was raised as to it being idle as contended in the written submissions (see paragraph 11 of the Plaintiff's submissions in reply).

73. It would be rare for a buyer observing the soap production line while at work, before purchase and to me this was not a requirement for ascertainment of indemnity value. Since there were many components that needed to be arranged in accordance with the factory plan of the Plaintiffs' the possibility of such compatibility was sufficient for the consideration of indemnity value.

74. There was evidence that this plant was working before decommissioned and owned by a multinational company. If this evidence was not accepted by the plaintiffs, they would not have visited such a long distance and would have raised their concern at that time. This type of specialized machinery cannot be tested at production unless on the site. There was no dispute as to its production capability before it decommissioned, the Plaintiffs in the submission argue that the said plant would have been over worked. This was a risk and if raised at that time would have been resolved by the owner with production records etc.

75. Its previous owner was a multinational company and a company reputed for its management practices around the world. It was also a pioneer and market leader in the soap manufacturing field as well as in best practices in the management field. This would also add value to the machine of this nature.

76. The Plaintiffs had obtained a quotation for refurbishing of the entire plant, so that it would carry a warranty. Even in that process Plaintiff was unable to find any defect in the components for which they obtained refurbishments. So there was no complain about the condition of components being bad or unusable, but the Plaintiffs desired a warranty.

77. This line was newer than Plaintiffs' and had greater capacity, had a higher level of automation, was from fewer manufacturers, and was more multifunctional when compared to the insured's destroyed line.

78. The line was priced at £ 125,000 – (Marchant letter 29 April, 2003 at Defendant's Exhibit D5 pages at 71-73) a combined price that was used by both Plaintiffs and Defendant in their costing. The total measured cost of purchasing, shipping, and installing this line was FJ$605,764. Mr. Godfrey arrived at the shipping and installation cost by using Marchants and local experts to cost all elements of all shipping and installation work across all equipment, and then allocating that cost to each plant item on a pro rata basis a percentage. This was done to enable the value of each line item to be identified. The exchange rate that was used was £1:FJD3.15. The Plaintiff used the same pricing, shipping and installation costs.

79. Within a short time, after inspection the said toilet soap line at Prague, by the Directors of the Plaintiff, was sold to a third party. This also proved that the value quoted was not an unrealistic value and its actual resale value though this type of production line would be difficult to find a buyer due to its nature. This may also eliminate any fears that the Plaintiff had regarding the soap line's working condition, but they have obtained a refurbished cost that would also have a warranty. In that process the examiners would have identified any defect of the plant. There was no evidence of such detection. So it was safe to deduce that said plant had no such defects and could be used without refurbishment.

80. Since it was no longer available for purchase, as it was sold to a third party after inspection by the Plaintiff, the value of the said line with addition for installation and other contingency costs can be considered as the indemnity value.

81. However, the Plaintiff had expressed concerns that the said toile soap line had just been used by a major manufacturer, and may have been worked heavily, but there was no evidence of such finding. If such concern was there at the time of inspection, why should they send two of its Directors to inspect the plant and machinery? They were fully aware of the previous owners of the plant. So, this was an afterthought.

82. In any event this position also admits that the said toilet soap line was in optimal or near optimal operational condition even after the date of fire and would support the Defendants position that its price can be used as indemnity value of Plaintiffs' plant. There was no evidence that it was used beyond its life time or any overuse.

83. Compared with Plaintiff's MM components which were manufactured in 1969 the Prague Line cannot be considered worse than what was destroyed. There was no evidence that said machine had any major problem. All the evidence point to that said soap line was better than the destroyed one and can be considered as comparable one for arriving at indemnity value.

84. The Plaintiffs feared that the plant would have overworked, although it was hard to quantify. The Plaintiffs destroyed Toilet Soap Line was functioning at the time of the fire, there was no guarantee about its life span as it had as the all MM components, which were the main components, were made in 1969 and had no warranty. So asking warranty for the toilet soap line cannot be justified in search of indemnity value.

85. Considering the location and any other unforeseen contingency the Defendant, included in their costing an additional sum of FJ$250,000 to cover the cost of any work required on the equipment that could not be identified by anyone at the time. This arbitrary risk sum was to take account of the Plaintiff's remote location and other factors had it proceeded to purchase this line.

86. The FJ$250,000 was 'allocated' after considerable thought from the Godfrey team. In his evidence, to be found at Defendants Exhibit 6 at page 19 - Mr. Godfrey said:

> "*87. I should point out that the Godfrey team had considerable internal debate about the need for this risk sum allowance. It is something of a stretch to say that a 1980s plant, that is at least a complete generation ahead of the insured's plant, was not more than equivalent to the insured's plant as it was, without this allowance. Unlike the Punja plant, it had a market value in Europe as evidenced by having being sold quickly, and it had clearly been working at or near capacity until it was decommissioned, so it was unlikely to have major problems. The Punja plant was much older, did not work to capacity, and was in a harsher environment. But, even though we had no reason to believe so, we cannot say that the assumed Unilever maintenance regime near the end of its lease would be to its normal standards, so there was a risk of some deterioration late in the lease, when the risk to Unilever's production was less. This was pure speculation, but a risk to the insured or any new owner.*
> *88. Overall we accepted that, to give the insured comfort that any unidentified defects could be restored, an allowance would be required. I was, and am satisfied that our sum more than met the insured's policy entitlement. The insured had chosen to insure its plant on an indemnity basis only. It therefore naturally expected that it would be paid no more than second-hand working value for its plant. I believe that assessment against a working plant, with due allowance for installation and commissioning, plus a contingency for risk actually is at least an appropriate measure of indemnity in this case.*" (underling added)

87. This allowance brought the indemnity assessment to the assessed indemnity value of the toilet soap line to $855,764. In summary, indemnity value for the said claim is calculated in the following manner in the Defendant's submission

Item	**Defendant's Exhibit 5 reference**	**£**	***FJD***
Purchase price, converted at $3.15	Pages 71-73	125,000	393,701
Shipping, installation and commissioning	Page 43: "Installed and Commissioned" column, attributed cost at 34.97%		137,677
Subtotal - with minor exchange rate rounding			**531,374**
Sheng Shung Plodder Model SS-29-1982	Page 41: Item GF N.19		70,000

Subtotal			**70,000**
Spare parts:			
2 extra blade sets to cutter			500
Vacuum pumpset, 70 x 70mm reciprocating			inc
Toledo 180kg Platform Scale type 21-20			525
Glycol compressor			inc
Metal cpd, 1 shelf			20
Galv double sink.			20
Metal shelving, AC type			3,325
Subtotal	Page 41: Item "Sundry Items" GF N.24-32		**4,390**
Total assessed by Godfreys			**605,764**
Risk Contingency	Mr. Godfreys evidence		250,000
Total			**855,764**

88. The Plaintiffs in their claim used the same purchase price Defendant used i.e., £125,000 for the line. But the Plaintiff was concerned that the equipment had been working hard for Unilever, and it said it could not be confident that the equipment would be up to the standard of its own. This was not proved by the Plaintiff. Such a thing required to be proved though evidence, before claiming for refurbishment.

89. By the same token one could argue that since the plant was decommissioned to scale down the operations in Prague, it would not have used to its optimal level and the components were manufactured in 1980's and was in a better condition than the Plaintiffs, but there was no evidence to support such contention, too. There are conjectures, without sufficient proof at the hearing.

90. The Plaintiffs calculated its claim by asking Marchant to provide a quotation for refurbishment of the line to the extent that it would include a warranty. The refurbishing price was as high as the second had plant value, indicating the extent of refurbishment. Its price was £250,000.

91. This comes with a warranty and there was no evidence that Plaintiff's machinery in the destroyed soap line had any warranty at the time of destruction. So, obtaining machinery

with warranty for the toilet soap line that did not have warranty was a 'bonus' for the Plaintiff.

92. The Plaintiffs' toilet soap line was destroyed comprising with mainly from MM components made in 1969.

93. So the refurbishment of the toilet soap line was a substantial improvement to the soap line that can be considered as comparable and this refurbished value cannot be considered as indemnity value. This was a 'bonus' for the Plaintiff and cannot be allowed under indemnity value.

94. The Marchants quote is to be found at Defendants Exhibit 5 at page 71 and says:

> *"However it was also proposed that you would take these machines in a **fully refurbished state** since to take them as they are as this moment all be it in good running condition they would carry **no guarantees with the sale.** By having them fully reconditioned you will receive the benefit of a **full guarantee for the equipment**.*
>
> *The above is a general outline of our proposal and it should be well noted that the original quotation allowed for the equipment to be supplied in an "as running" order un-reconditioned without guarantee and the revised quotation for the equipment to be refurbished carries our full manufacturers guarantee".* (emphasis added)

95. Although no evidence was called by the Plaintiff as to what the quotation by Marchants entailed, it was clear from the costing of the quotation that Marchants were quoting for a complete overhaul of all important components of the line. Mr. Godfrey in evidence identified this as 'complete refurbishment with guarantee'. This was never a feature of the destroyed soap line.

Depreciation Method (Suggested as an Alternative by the Plaintiff)

96. The Plaintiff suggested an alternative approach to establishing an indemnity value. It sought to establish the indemnity value of the toilet soap line using the depreciated replacement value method. Though this method can be used for certain assets in the

calculation of the indemnity value, this was not suitable for the Toilet Soap Line destroyed by fire.

97. Mr. Godfrey in his evidence explained why the depreciated replacement value method was inappropriate to establish indemnity for this particular item. He said it was inappropriate because claim preparer used a new plant with brand new technology to derive a value for an old plant of low technology. One cannot assume the 1969 technology to remain unchanged for more than three decades.

98. Thus, the starting figure for depreciated model was not for a similar item to the one that was destroyed, but one with all current technological advances and efficiencies that simply did not exist in the destroyed toilet soap line. This alone would be sufficient to reject depreciated replacement method for the destroyed soap line.

99. It should not be taken as rejection of depreciated replacement method for arriving at indemnity value, rather this method was not suitable for the indemnity value ascertainment for this claim, under the given circumstances.

100. The Plaintiff discounted 75% but provided no basis to support this rate of depreciation. It is often in accounting there are fixed depreciating factors for different types of assets for different purposes. Sometimes, for tax purposes a different depreciating factor would be applied, depending on the fiscal priorities of a country at a particular year. At the same time accounting standards would also denote depreciating factors in order not to obtain inflated account statements. It may be important to depict the correct statement of affairs from the financial statements. Either way these depreciating factors (percentages) will not be always same and will change with time. So it is important to use an accepted depreciating method and calculate it and arrive at a value, which was not done in this instance. So, there was no justification for deciding 75% depreciating factor.

101. So 75% depreciation of the cost of new plant will not indicate indemnity value for the destroyed plant. This value cannot be even used as any comparison since the starting

point and depreciation factor (75%) were not justified for the lost item. So such a value obtained cannot be utilized for any worthwhile comparison to determine indemnity value.

102. Apart from this it was inappropriate to take a new machine and discount it when there was a comparable toilet soap line for sale at that time, where even the two Directors thought fit to visit Prague for examining of that soap line. The fact that it was sold shortly after the inspection by the Plaintiffs, proved the value of that comparable soap line in Europe. There was no evidence that the Plaintiffs' plant that got destroyed had such a market value either in Fiji or in the region.

103. So the toilet soap line which was on sale at Prague, was available to ascertain on a market tested basis the indemnity value of the destroyed Plaintiff's plant. There was no evidence against the comparison of the two plants. According to the Plaintiff, the only thing, required to make it be used as a comparable to the one destroyed was to obtain a warranty for said machinery. So, there was no need to obtain the value of new machinery for calculation of the indemnity value of the said soap line.

104. The Defendants could not be expected to find identical soap line as such a line would not exist or would be rare considering the age of the MM components and also the different makes of components ,that made toilet soap line that got destroyed from fire. At the same time even if such a plant was located, whether the owners would be willing to sell or quote a price was another issue considering the competition in the field. The Defendants have done what was possible to obtain a toilet soap line comparable to the one that destroyed and by conduct the Plaintiffs admitted said soap line as comparable one to the destroyed one.

105. The Plaintiff suggested that the $250,000.00 risk contingency allowed by Godfreys was allocated as a contingency only against the Secondary Podder MM 1/250 s/N0 0769 C/W Screw feeder in Schedule M2, page 11 of 20 in Tab 11 in Folder 2.

106. It was never part of the Plaintiff's case that the FJ$250,000.00 risk contingency was allowed against a specific item only. Mr. Faire was not asked whether it was his position or understanding that the FJ$250,000.00 risk contingency was only for the Secondary Plodder.

107. It would be improbable to suggest such a proposition, considering the amount allowed for the contingency. If there was a reason for allowing such a value for contingency for one item only, there should be a basis for that and that basis should support documentary evidence. Specially the correspondence between the parties.

108. It was also clear from the communications of Mr. Godfrey prior to the litigation and even during evidence including the tables and schedules prepared by both parties and presented to the court.

109. The Plaintiff's own schedule at Tab 11, Schedule M2, page 11 of 20, the FJ$250,000.00 was a separate item altogether at the end of the costing for the toilet soap line. If the Plaintiff had believed that the FJ$250,000.00 was a contingency only for the Secondary Plodder, then Mr. Faire's schedules would have shown this only under the said item and the reason for such allocation would have been stated.

110. In 1999, the Plaintiff had the toilet soap plant valued at $875,532.00 (i.e Beca valuation). This evidence was at Folder 2, Tab 11, Schedule M2 page 12 of 20 at line GF N.32. Four years later, the Plaintiff was claiming an indemnity value of $1,424,235.00 for the same toilet soap plant. If such increase was justified it can be considered. Any plant and machinery would need to be depreciated and cannot increase the price unless there were details of improvements to it with necessary adjustments to the said improvements.

111. If the Plaintiffs desired a depreciation method to arrive at a price this price of $878,532.00 should have been the starting value as that was the nearest valuation that was done before the fire. This value should be depreciated for five years and any additions and improvements could be appropriately added for correction. This was not done and no explanation given for not using this valuation by the Plaintiff. This can

be considered as alternative method more accurate than obtaining the starting value from a brand new machine with latest improvements and automation. In fact there was no need to search for such value when valuation of entire toilet soap line was available as at 1999. So, if the depreciation method was to be used that value should be the starting value with adjustments, like any improvements or replacements.

112. Though using a different method the Defendant's calculation of FJD 855,764 was not only more realistic but can be considered as indemnity value for the soap line in the assessment of damages in this proceeding, from the evidence presented to the court.

Laundry Soap Line

113. The Laundry soap line comprised primarily of a plodder and vacuum hopper, pipe work, dossing pumps and lines and a soap cutter.

114. The presented, adjusted and the amount in dispute for the Laundry Soap Line claim were as follows:

Presented	Adjusted	Dispute
$318,534.00 ($250,000 for repairs quoted by MM + $58,534 for the soap cutter)	$237,019.00	$81,515.00

115. It was agreed between the parties that the laundry soap line, with the exception of the soap cutter, was repairable. The items were located in an area least affected by the fire. This was accepted by both parties at the hearing. So in the evidence it was admitted that these items could be repaired except the soap cutter. The repair costing was done by Mr. Wakelin for the Defendant and he gave evidence. It was not clear who did the costing for the Plaintiff. It was not been done by Mr. Fair who gave evidence relating to the said claim, he could not give details about the claim. So, the Plaintiff failed to prove their claim for Laundry Soap Line.

116. The Defendant's argument in respect of this aspect of the claim was that the Plaintiff adduced no evidence to establish it claim for $318,534.00. The Plaintiff only called Mr. Faire to give evidence on this aspect of its claim and this was not sufficient proof of their claim. No evidence of quotation of soap cutter was presented to prove the allocation of $58,534 for the said soap cutter or for the repair cost $250,000.

117. First the Plaintiff should have proved the age and model of the soap cutter, that destroyed from the fire, to ascertain its indemnity value. Without that how could the value of $58,000 be proved for the item for indemnity value. The Plaintiff did not make an effort to prove such details to support their claim. Such details were not revealed in the evidence.

118. In his evidence in chief, Mr. Faire said ,(Folder 2, Tab 11 at page 7):

> *"Based on Punjas' **verbal advice from MM** on the potential scope and cost of repairs, we believe that $250,000.00 would be reasonable indemnification for this part of the claim. This is at the lower end of the scale provided to us, the upper end being in the region of $350,000.00."(emphasis is mine)*

119. Mr. Faire then read from Folder 2, Tab 8 at page 13, paragraphs 42 to 46 relating to the Laundry Soap Line. At paragraphs 44 to 46 of Tab 8 Mr. Faire said:

> *44. "This line was specialized MM equipment that was badly damaged in the fire. Rajesh and Pravish Punja reported that discussions with MM indicated that repairs were likely to be more extensive and complex that NIA's consultants had suggested and that they should be executed by or at least overseen by a technical representative from MM, the manufacturer of the equipment.*
>
> *45. On this basis, the Plant and contents claim for repairs to the Laundry Soap Line to restore it to the condition it was in immediately before the fire was assessed at $318,534.00, which is $143,823.00 more than has been agreed by NIA.*
>
> *46. The Punja claim also includes $58,911.00 for an MM Soap Cutter for which NIA has allowed an uncorroborated amount of $40,244.00 that I cannot explain. I have received no information in support of the lesser amount. I refer to the MD Final Report and*

the text commencing "MM Soap Cutter" on page 7 for an explanation of the basis of the estimated repair cost of $58,911.00 salvage."

120. This was the evidence adduced by the Plaintiff for its claim for the laundry soap line for $318,534.00. The amount claimed was no more than a round off figure that MM apparently advised the Plaintiff it would cost to restore the laundry soap line to the condition it was in immediately before the fire, but this evidence was not substantiated with documentary proof.

121. There was no quotation by MM for the said repair and what type of repair that was intended for that price was not presented and to what extent such repair was justified was not presented to the court. Whether such repair would include a warranty or not (as Merchants have done in refurbishment to Toilet Soap Line) was not clear. In the circumstances the Plaintiffs have failed to prove their claim for $318,534.00 as an indemnity cost of laundry soap line damaged by the fire.

122. The Plaintiff did not assess or have anyone asses the repair costs for the repair of the laundry soap line. The items of repair and extent of damage should be determined before quoting a figure for the repair. Without such an assessment a repair cost cannot be determined. Mr Fair was unable to establish this claim in his evidence.

123. Mr. Wakelin, who was an Engineer by profession in his evidence demonstrated in a detail how he arrived at price for the laundry soap line identifying the damage and the required repair. Therefore the Defendant's adjusted figure of $237,019.00 was proved as indemnity loss for the Laundry Soap Line. In the cross examination he was able to substantiate his position, with details of it.

124. Though Mr. Faire said this Laundry Soap Line was specialized he could not prove how specialize it through evidence the amount claimed by the Plaintiff. In the cross examination he said he could not substantiate the amount as he was not an Engineer. No

Engineer was called by the Plaintiff to substantiate this amount. The burden of proof of the claim was with the Plaintiff to prove the claim on balance of probability.

125. The Defendant was able to explain in detail how the adjusted amount of $237,019.00 was arrived at. The repair cost of the Laundry Soap Line was calculated with the assistance of Mr. Wakelin.

126. The Defendant established the total cost of $237,019 by detailed measure of component costs, labour costs, expert engineer costs and margins where applicable. Mr. Wakelin gave detailed evidence. He presented the detailed schedule of how the laundry soap line claim was adjusted at $237,019.00. The Plaintiffs' contention that this was not proved is without merit.

127. The evidence was to be found at the pages referred to in Defendant's Exhibit 5 and it was made up as follows:

Laundry Soap Adjustment **(Summarised version of pages 113-115 of Defendant's Exhibit D5)** **Location**	**Description** **(From Beca Valuation)**	**Adjustment**
GF D.1	**BAR SOAP MANUFACTURING AREA**	
GF D.2	Condensing unit, MM, SC10TX, pipework, controls	inc
GF D.3	Electrical power switch and control panel and cable	inc
GF D.4	Jacketed pan, wrns steam heated 9500 mm dia	inc
GF D.5	Second tank, 500dia, 600 high, mounted	inc
GF D.6	Plodder MM TR227SE S/No. 2870 (refer below)	199,836
GF D.7	Extruder head	inc
GF D.8	Staging and steps to vacuum unit above plodder	inc
GF D.9	Vacuum unit adj plodder (inc in Beca 255)	inc
GF D.10	Tool stand adjacent plodder	inc
GF D.11	Pumpset with balance tank, pipework	inc
GF D.12	Vacuum pumpset. (inc above)	inc
GF D.13	Vacuum pumpset, MM PL52200M c/w Seperator water tank	inc
GF D.14	Pumpset MM 50mm c/w pipework & controls	inc
GF D.16	Soap cutter, MM TCS continuous, roller conveyer - allowance	30,000
GF D.17	Conveyor inc in Bca 258	inc
GF D.18	MM Colour additive Tanks 2 x 85 litre Twin head dosing pump	inc
GF D.19	Twin head dosing pump inc in Bca 259	inc
GF D.20	Yellow colour additive tank as above	inc
GF D.21	20mm galv piping, additives to plodder	inc
GF D.22	Cooling tank adj, 600l, 300w, 400h	inc

GF D.23	Steam pipework and valves on dividing wall to toilet soap	inc
GF D.25	Galv packing table, 650 sq x 300,	8
GF D.26	40 cm fan	13
GF D.27	Crown hand pallet truck,	250
GF D.29	2no, 3 blade ceiling fans	83
GF D.30	Switchboard	inc
GF D.31	Fire hose reel- hose missing	6
GF D.32	Soap bins x 33	1,989
GF D.33	Electric fly killer	167
GF D.34	Metal shelving, AC type	4,667
		237,019
Particulars of Item GF D.6 included above		
(Summarised version of Page 89 of Defendant's Exhibit D5)		
Plant item no	Item	
D2	Heat exchanger (detailed calculation P90, D5)	954
D4	Jacketed pan	100
D5	Jacketed pan	100
D6	Vacuum drier and plodder dust arrestors, barometric condenser (detailed calculation P90, D5)	21,882
D8	Steps	100
D11	Pump set /balance tank	100
D16	Soap Cutter	173,800
D17	Conveyor	800
D18	Colour additive tanks (2No)	1,800
D20	Yellow dosing tank	1,800
D26	40 cm fan	200
	Part total	**201,636**
	Less duplicated dosing tank	- 1,800
	Subtotal carried to main adjustment	**199,836**

128. Mr. Wakelin in evidence said that the Soap Cutter (Item D16 of his schedule in evidence W0010) was costed on MM's price at EU79,000 converted at EU 1:FJD2.00, plus 10% freight, bringing the total to $173,800 - Defendant's Exhibit D5 at page 90, item D15.

129. From the available evidence for assessment of indemnity value for the laundry soap line that was damaged the Plaintiff had failed to prove their claim. Mr. Fair was unable to prove the components in their claim. In any event he could not have proved them as he often said he was not an engineer to answer issues relating to machinery. So on the balance of probability the amount $237,019.00 can be considered as the indemnity value for the loss to the Plaintiffs for the Laundry soap Line.

Other Areas

130. The Plaintiff presented a claim for $163,614.00.Godfreys adjusted this claim at $147,844.00. The parties agreed to split the difference at $155,729.There was no dispute on the amount of $155,729.

Consumable Stocks

131. The Plaintiff presented a claim for $16,797.00. Godfreys accepted the claim of $16,797.00 for this item. There was no dispute for the amount of $16,797.00.

Item 7 – Demolition

132. The Plaintiff submitted a claim for $50,000 for demolition works.

133. The presented, adjusted and disputed amount for the demolition works claim was as follows:

Presented	Adjusted	Dispute
$50,000.00	$31,111.00	$18,889.00

134. The Plaintiff could not substantiate the claim for $50,000. At one instance Mr. Fair said that he thought it was agreed. This cannot be accepted as he could not produce any evidence to that effect.

135. The Plaintiff had obtained 3 quotations for the demolition works but the quotations were not produced in evidence by the Plaintiff. The Defendant's position was that Godfreys agreed to accept the lowest quotation obtained by Fawcett Faire for the demolition works. This was corroborated by Defendant's Exhibit 2. This was an email from Mr. Moonlight of Godfreys to Mr. Maritz of Fawcett Faire confirming the agreement. The relevant part of the email says as follows:

> *Hi David,*
>
> *Confirming our conversation today, understand that the demolition quotes are now:*
> *Goundra $56,000.00*
> *CR $55,000.00*
> *Construction $35,000.00 All VIP*

The demolition quotes of all 3 contractors include the following:

1. *The ENTIRE building including slabs and foundations.*
2. *The salvaged plants will be removed and transferred to the adjacent site.*
3. *All inbuilt services will be demolished and removed unless advised otherwise.*
4. *The demolition contract will be supervised by Sanjay Kaba.*

Confirming we will not question the lowest quote (subject to seeing a hardcopy), and to Mark being able to see the associated plans tomorrow to confirm they match with what is stated on the quotes.

136. There was an agreement between Mr. Moonlight and Mr. Maritz that the lowest quote would be accepted by Godfreys. This was subsequently confirmed by Mr. Moonlight when he said "Confirming we will not question the lowest quote." The lowest quote obtained by Fawcett Faire was $35,000 inclusive of VAT. Excluding the VAT amount from the lowest quote of $35,000 was $31,111 and this can be considered as the demolition cost.

General Contingency

Claim	Adjusted
nil	$30,000.00

137. Separate from other plant items Godfreys allowed a contingency of $30,000 for unknown costs associated with unidentified loss in the plant area. This was included to allow for general items that may have been missed in the detailed assessment. The insured had no corresponding item in its claim. Mr. Goffreys in evidence said that this amount was allowed considering nature of destruction where parties might fail to identify all the claims. I allow this contingency.

Professional fees

Claim	Adjusted	Disputed credit amount
$149,807.00	$153,325.00	$3518

The adjusted figure was more than the claim, so I cannot see any objection from the Plaintiff for paying more! I accept the adjusted figure $153,325 for the said claim.

Europe trip

138. The Defendant agreed to pay for part of the expenses for two Punja Directors to inspect the Prague Plant. There was no dispute for this claim of 30,000. I allow it

MM Trip

139. There is no dispute as the claim in this amount, too. The claim of 30,000 was agreed between the parties. I allow the claimed amount of $30,000 for the said claim

Computer Allowance

140. This claim was referred to items deducted from Item 1 – Office/Laboratory.

141. The presented, adjusted and disputed amount for the computer allowance is as follows:

Presented	Adjusted	
$0	$15,500.00	

142. It was separately estimated by Godfreys as the indemnity value of the computer system lost in the fire at $15,500, and the items to which it related to office laboratory and plant claim were deducted by Godfreys from that category. Now the said category was undisputed so the 15,500 should be allowed for computer allowance.

Item 13 - Salvage

143. Mr. Godfreys credited a sum of $30,000 for salvage.

144. The salvage provision of the Insurance Policy is found at Tab 7, page 8 – says:

Where any Insured property is lost or damaged, the company may:

(a) enter any building where the loss or damage has occurred and take and keep possession of the damaged property,
(b) deal with the salvage in any reasonable manner;
provided that –

1) the Insured will not be entitled to abandon any property to the Company;
2) the Company will not be entitled to sell or otherwise dispose of salvaged branded goods without the prior consent of the Insured.

145. The Plaintiff in the written submission contended that the claim for salvage had to be determined by common law.(see paragraph 47) This was not correct position, as it was specifically dealt in the Insurance Policy. Accordingly, the Defendant should deal with salvage reasonably. This left the court to determine what was reasonable under the circumstances. Mr. Godfrey said the reason for leaving the salvage with the Plaintiff. He said that the industry feared the salvage getting to the wrong hands – the competitors.

146. Quite opposite to what contended by the Plaintiff, it was the Plaintiffs who cannot abandon any salvage property to the Defendant. This was understandable as when something gets destroyed it may sometime become hazardous for the environs, and the primary obligation in such situation would be the owner not the insurance company, but depending on the policy the cost of cleaning may be recoverable. Even for sale of salvage the consent of the owner was needed, under the Insurance Policy.

147. The Defendant was unable to provide evidence in support of the salvage value. There was no proof of that by the Defendant. This was an item which the Defendant wanted to deduct from the claim, so the burden of proof was with the Defendant to prove the salvage value, but it had not done so. Except Mr. Godfrey's evidence no quotation for salvage was produced at the hearing. This was inadequate to prove salvage on the balance of probability. Even if there was a value for the salvage, it should be properly obtained from a person interested in purchasing it and should include the details of the pricing including the manner of pricing the salvage.

148. The Plaintiff argued that it had offered the salvageable items to the Defendant. Mr. Mr. Godfrey declined, saying it was for the insured to proceed and secure best salvage for the material. This is not the correct position in terms of the conditions of the Insurance Policy. In terms of the Insurance Policy the Defendant should obtain consent from the Plaintiffs if they desired to sell the salvage to outside. Mr. Godfrey said this type of salvage was not sold to outside due to the stiff competition in the soap industry. This evidence was not challenged in the cross-examination. So it is unlikely that the Plaintiffs

would have given consent to the Defendant to sell. If they desired the Defendant to sell then there should be evidence of their consent to such sale. There was none.

149. The absence of that indicates that there was no such request from the Plaintiffs to the Defendant to sell the salvage in local market.

150. Mr. Godfrey in his evidence also stated that there were few local interests shown for the salvage but did not sell due to the nature of the soap industry where there was stiff competition. This evidence was not denied by the Plaintiffs, but the issue remained the proof of the assessment of salvage . The Defendant was unable to prove $30,000 which they claim (for credit). There was no proof of that amount at the hearing so it needs to be disallowed.

Claim for All services except Electrical

151. The all services except electrical claim related to the pipes, pumps, valves, and related services. The presented, adjusted and the amount in dispute All Services Except Electrical was as follows:

Presented	Adjusted	Dispute
$317,677.00	$253,327.00	$64,350.00

Electrical Services

152. The electrical services claim related to the cost of providing electrical services to entire plant.

153. The presented, adjusted and the amount in dispute Electrical Services claim is as follows:

Presented	Adjusted	Dispute
$397,875	$132,660	$265,215

154. Above two claims were inter related and both were considered together.

155. Mr. Faire was not able to explain how his presented claim of $317,677.00 for all services except electrical and his presented claim of $397,875.00 for electrical services was made up. He said he did not bring the documents to support the claim.

156. The Plaintiff also called Mr. Kumar, and Electrical Engineer, but he also said he did not bring the documents to support this assessment which was the basis for the Plaintiffs' claim. They were the only witnesses that were called to prove the claim, but both have failed to produce vital documentation to court to prove the claim, but the Plaintiff state that they have proved their claim. The total claim for this item was substantial but none of them treated with the gravity of the claim.

157. Similarly, Mr. Faire was not able to give any explanations for the claimed figure of $397,875 for the electrical services claim. In particular, the sole document produced by the Plaintiffs in support of the services quantum, the EPL letter dated 13 June, 2003 was shown to Mr. Faire. He was unable to identify the document or how it related to the plaintiff's claim.

158. The Plaintiff called Mr. Kumar to give evidence on this claim. Mr. Kumar was a person having experience in factory layouts, supervision of plant installation and plant commissioning, but his evidence was that he had left vital documents that support the claim in his archive.

159. The Plaintiff's claim for electrical services and all services except electrical formed a substantial part of its claim. The total claim by the Plaintiff for these two items was $715,552.00.

160. Mr. Kumar was not able to give details of his calculations of the figures. He did not present the details to support his costing for the two items. Mr. Kumar's position was that he had prepared detail costing but they were back in his office in archives and he could not bring them because of short notice by the Plaintiffs.

161. The Plaintiffs had more than one year from the decision of the liability to prepare for the assessment hearing. This action was instituted in 2005 and initially it was not decided to have a split trial, hence the necessary witnesses should have been arranged and with necessary documentation at that time the documents that needed for proof should have been included in the affidavit verifying lists of documents of the Plaintiff. The documents relating to the said calculation were not presented.

162. Mr. Kumar was not able to give any details of his calculations for indemnity cost, except for his round figures in Tab 19 in Folder 2. It was for the Plaintiff to establish the extent of its loss. Mr. Kumar admitted that his costing details were never sent to the Plaintiffs indicating that they were not even presented to respective parties, to this hearing. Though it may not be a factor that I needed to consider for the assessment of indemnity costing this indicate that, the basis for these rounded off figures were not seen even by the Plaintiffs!

163. So, how could they rely on such report for assessment before a court of law for proof on balance of probability. Mr Fair had totally relied on Mr. Kumar's assessment, but it was clear that even he would not have been convinced about the manner in which this claim was presented in the claim preparation. So how could he satisfy the civil burden of proof in court? This was not a proof on balance of probability the indemnity cost of the said items.

164. The fact that Mr. Kumar admitted that he did not provide the details of his costing to the Plaintiff and this was consistent with the evidence of Mr. Wakelin at Exhibit 8, paragraphs 20 and 22, where he said that details of the Plaintiff's costing were not made available to him at any time of the claim preparation and adjustment process.

165. Mr. Godfrey in his evidence stated that the claim relating to electrical services and all services except electrical was one of the most detailed areas of Godfreys assessment, and relied on a complex series of unit costs extrapolated to measure the insured's exact requirements for this plant. He had calculated details of bracket, valve, support bracket

and flange, pump, valve and component of any description had been identified and considered into the his calculations .

166. Mr. Wakelin assisted Godfreys on behalf of Defendant and he gave detailed evidence on this claim. Mr. Wakelin's was a detailed concise measured costing and on the balance of probability this evidence can be accepted as indemnity cost for the item.

167. Mr. Wakelin had substantial experience in plant and equipment valuation, and he was a reputed Engineer, in the mechanical field, according to the evidence of Mr. Fair. The extent of his experience is contained in detail in his Statement of Evidence from paragraphs 2-5 of Defendant's Exhibit 8. His CV is Defendant's Exhibit 7 and there was no challenge to his experience or his integrity.

168. Mr. Wakelin used experienced Sinclair Knight Merz (SKM) mechanical and electrical staff to undertake the detailed work of assessing the quantum of the claim. Mr. Wakelin in his evidence said that the SKM staff and sections concerned with the work were very experienced industrial and electrical engineers, having been involved in the design and construction of many industrial projects.

169. So, Mr. Wakelin had employed experienced mechanical and electrical engineers for the initial work. They were sufficiently knowledgeable for appropriate costing for such work. Mr. Wakelin was cross-examined by the counsel for the Plaintiff, and in the cross-examination he gave details of the said claim and his involvement and was able to establish the calculations.

170. Mr. Wakelin used the following background information to assist the valuation included:

(i) Edison Consultants as built drawing schedule dated March 2003 for Process industrial, hydraulic service and electrical services

(ii) Houng Lee Kaba and Partners – floor layout plans February 2003

(iii) Edison Consultants Fire Damage Assessment Report -Building services and process services

(iv) Data from Godfreys containing information from a plant valuation schedule by Becas provided by the plaintiff

171. The information used by Mr. Wakelin was provided by the Plaintiffs. They were the Plaintiff's documents. Mr. Wakeling gave detailed description of how he arrived at costing. (See Defendant's Exhibit No. 5 p 78-111 and Exhibit 8 annexed 2).

172. This evidence proved the Defendant's adjusted amount on balance of probability. Compared with Mr. Kumar's evidence on the issue Mr. Wakelin was more methodical and precise. Mr. Fair could not give evidence relating to the amounts in his evidence.

173. The adjusted claim for All Services Except Electrical was made up as follows:

D5 page		Table Name	Table total	Indemnity Adjustment
		Piping		
105		Water Supply	47,421	
104		Water Supply	15,556	
103		Tallow Piping	14,907	
102		Caustic Soda Piping	20,368	
101		Soap Piping	12,934	
100		Lye Piping	23,350	
99		Coconut Oil & Chilled Water piping	28,068	
98		Process water piping	9,323	
97		Cooling water piping	36,453	
96		Steam Piping	52,179	
95		Condensate Piping	34,501	
94		Compressed Air piping	27,807	
	Subtotal 1		**322,870**	
		Branch Line allowance at 7.5%	**24,220**	
	Subtotal 2	Total Piping	**347,090**	**173,545**
		Less duplicated items		- 7,500
116		Net piping		**166,045**
		Valves		
105		Valve schedule	1,332	
104		Valve schedule	366	
103		Valve schedule	2,788	

102		Valve schedule	3,523	
101		Valve schedule	8,831	
100		Valve schedule	17,733	
99		Valve schedule	2,444	
98		Valve schedule	1,415	
97		Valve schedule	1,188	
96		Valve schedule	30,641	
95		Valve schedule	1,947	
94		Valve schedule	23,040	
	Subtotal 3		**95,248**	**47,624**
		Pumps – repairs		
81		Line items GF D.5.1 - GF C.46 inclusive		**39,658**
	Total Laundry Soap adjustment as per Godfrey evidence			**253,327**

174. The adjusted claim for the electrical services was made up as follows, the details of which are to be found at pages 82-84 of Defendant's Exhibit 5.

D5	Category	Table Name	Table total	Indemnity
82-	Electrical	Replacement Value (Electrical), being all detailed in this schedule	275,822	
		Less design moved to fees section	- 10,500	
		Net adjusted electrical services claim as per Godfrey evidence Para 19	**265,322**	**132,660**

175. Considering the evidence of Mr. Wakelin and Mr. Kumar it was evident that Mr. Wakelin had produced a detailed analysis of his costs for the damage and this proves indemnity value for the item. Mr. Kumar's rounded off figures were not supported by any documentation and cannot be relied as there was no such detail as to how he arrived at such amounts.

176. Even looking at figures in Mr. Kumar's costing, one could easily see all are round figures indicating absence of any detailed costing. In the circumstances I accept the costing presented by Defendants $253,327.00 and $132,660 as indemnity value for the said items.

Transformer

177. The first issue was whether this can be allowed as a loss to the Plaintiffs. According to the Defendants the Plaintiffs could not prove that there was an insurable interest in the said item in order to claim.

178. The Plaintiff could not produce any documentary evidence of actual payment for the purchase of the transfer or even that being considered as an asset to the Plaintiff in its books of accounts or in its assets register or in the latest valuation of assets before the fire which was done in 1999 (Becca valuation).

179. No evidence was given as to why it was not included in any of these valuations prepared by the Plaintiff, prior to the incident. This was a vital issue that was not answered by Plaintiffs in evidence. First the Plaintiffs should be able to prove that the transformer was an asset that belonged to the Plaintiffs that had an insurable interest.

180. Nearly after a year from the fire the Plaintiff produced a letter from FEA but lost adjusters for the Defendant was sceptical about this letter. The letter was provided by the insured from an employee of FEA but this document was not proved by the Plaintiff at the hearing calling evidence.

181. The author of the said letter could not be located by the Defendant to verify the authenticity of the document. This had increased the speculation on the claim.

182. Even at the hearing the Plaintiff did not call the author of the letter to prove it. If the said person cannot be found a fresh letter from FEA could have obtained from a person who can give evidence in court prior to the assessment. The Plaintiff did not do it and thus there was no proof of the claim for transformer by the Plaintiff.

183. It was common ground that the transformer had been in place for a considerable time, at the location, and may be from the start of the factory at that site as it may have been a dedicated transformer. There was no evidence produced from FEA, except the said letter, on this transformer.

184. The Plaintiff was unable to produce any documentary proof that the Transformer was considered as their asset. In 1994 (Rolle valuation) a detailed asset valuation was done and again in 1999 (Beca valuation) there was a valuation of all the assets but the transformer was not included either the 1994 Rolle valuation, or the 1999 Beca valuation. The Plaintiff needed to explain this omission, and also the type of interest they had relating to the transformer.

185. The Plaintiffs in their written submissions stated that they were unable to prove their insurable interest as the transformer was installed 30 years ago. (See paragraph 111 of the submission). Even MM components in the toilet soap line were manufactured in 1969 (more than 30 years from fire) and would have been purchased at that time but this did not prevent them being proved as their assets. So, this argument cannot be accepted as an explanation for not producing proof. In any event, there was no explanation in the evidence of the nature of the arrangement between FEA and the Plaintiff relating to the said item. This should be available with the Plaintiff if they had an insurable interest.

186. Though a letter was from FEA the Defendant required more details as the author could not be located. Since there was no acceptance of the said letter the item remained disputed and the assessment needed to be done by the court. So the burden of proof of insurable interest was with the Plaintiff.

187. Mr. D. Lodhia was called to give evidence regarding financial matters but he was unable to explain how the transformer was missing in their assets registry, or the nature of arrangement of between FEA and Plaintiff relating to said item.

188. Mr. Kumar who gave evidence for the Plaintiff referred to said letter from FEA, but again it was hearsay evidence and I am not inclined to accept it as this fact could have been proved from direct evidence without much effort, but the Plaintiff did not do it.

189. Why the Plaintiff did not call evidence from FEA to prove the status of the transformer that got destroyed was not explained. By not calling FEA the letter of FEA remained not proved to the court, and without that there was no proof of its insurable interest.

190. According to the definition of "Insured Property" contained in the Insurance Policy states;

> *"Tangible property of every description not expressly excluded, the Insured's own or* *held by the Insured jointly or in trust or on commission or for which the Insured is responsible* *or has assumed responsibility all while located at any situation or other place anywhere in Fiji or as otherwise."*(underling is mine)

191. The Plaintiff did not adduce evidence to prove that it owned or 'held by the insured jointly or in trust or on commission for which insured was responsible'. Such evidence could be proved by calling evidence from FEA. Without calling evidence the Plaintiff cannot rely on the said definition as there was no proof of the arrangement between FEA and Plaintiff relating to the transformer.

192. The Plaintiff in the written submission contended that they were responsible for the transformer, but there was no evidence adduced at the hearing on balance of probability that they had an insurable interest in it. Such a thing would have adduced by an official of FEA, but failed to do it.

193. If the Plaintiffs were responsible for the transfer, what was the responsibility conferred on them has to be stated clearly. No such evidence was produced at the hearing. For a thing like transformer which was part of distribution of electricity, and would be part of the distribution grid of the electricity, hence it was FEA who can give evidence regarding the responsibility of the item and the insurable interest or any other interest.

194. The burden of proof was with the Plaintiff to prove the insurable interest of the transformer but the only evidence was the letter of FEA. In the analysis of evidence the insurable interest was not proved on balance of probability by the Plaintiff. The said letter does not indicate how the insurable interest was decided by the signatory to the letter. So an explanation was needed from an authorized official from FEA.

195. Even if I am wrong on the issue of ownership or insurable interest there was no evidence to prove the indemnity value of the transformer produced at the hearing.

196. Again the indemnity value of such a transformer could be adduced from FEA. How old the transformer was and its value at the point of fire was not established. Whether it was repaired or replaced during, the time of the operation was not revealed.

197. The onus of the Plaintiffs did not end at proof of ownership or insurable interest, but the proof of indemnity value for the item as well. There was no evidence produced at the hearing to ascertain the indemnity value of the transformer. This would have possible thorough evidence from FEA or another person who had special knowledge of the value of the transformer.

198. So, the claim for transformer cannot be granted on two grounds. First, there was no proof of ownership or insurable interest. Second there was no proof of indemnity value for the item, as no evidence was produced to prove it.

199. The claim for Transformer was not allowed for the above reasons. I do not wish to discuss the legal submissions contained in the written submissions for the Plaintiff on this issue. Without adducing required evidence legal submission cannot prove a fact in the assessment of evidence.

Additional Electrical Services

200. Mr. Wakelin discussed a claim value for $14,642 in additional electrical services costs, which is apparently not added in to the Godfrey's adjustment. This cost was the result of

revised plans sent to Mr. Wakelin, and was described in the summary of changes indemnity value of 50%, or **$7,321** was added accordingly.

201. It was also pointed out by Mr. Patel to Mr. Wakelin that the Engineering fees section of Mr. Wakelin's schedule of electrical services costs - Defendant's Exhibit D5 page 84, totaling **$10,500**, was missing from the Fees cover in Godfreys' adjustment. This should also be added for engineering fees.

202. There is no need to include the above two amounts under contingency as they were specifically identifiable and measurable costs. The contingency was for unforeseen costs that were missed by the parties.

Item 16 - Personal Effects

203. The sum of $1,350 was claimed as employee effects.

204. The presented, adjusted and disputed amount for the Personal Effects claim is as follows:

Claim	Adjusted	Dispute
$1,350.00	Nil	$1350.00

205. The policy provides a cover for personal effects of employees. The covering clause is to be found at Tab 7 at page 11. It says:

> *"Employees personal effects are deemed to be included in the description of Insured Property as if they were owned by the Insured, but only whilst the effects are in or about premises owned or occupied by the insured, or elsewhere whilst being worn, kept, carried or used by employees acting in the course of their employment."*

206. It is common ground that the personal effects claimed belonged to the Directors of Punjas. The items claimed consisted of a Digital Camera, a Digital Photo Printer, 10 Musical CDs, a Leather Travelling Pouch, and Miscellaneous Items of card holder, books, framed pictures, cordless mouse, 3 bottles of black label whiskey, 2 bottles of Absolut Vodka, 1 bottle rum, 1 bottle Gin and 1 bottle of VAT 9 Whiskey.

207. Mr. Lodia gave evidence to the effect that both directors were employees of the Plaintiff and they were in the payroll of the organization, but he did not bring any documents to prove his contention. This could have easily done by producing relevant pay sheets or other documents e.g. FNPF numbers etc. In the absence the Plaintiff failed to prove the claim for personal effect on balance of probability.

Building

208. There was damage to the building where the plant and machinery were installed. This building was located in a complex of industrial lay out. The Plaintiff desired commercial value of the building on rental capitalization method. The instructions by the Plaintiffs were specific for the said valuation. There was no independent judgment of the said valuation by the said entity employed for the purpose.

209. The Plaintiffs did not call the expert who made it to prove it at the hearing.

210. There was contrary evidence from another expert report regarding the valuation of the building. Mr. Fair was not the person who made the valuation. The Plaintiff's valuation report was prepared by Dunlop Stewart and it was disclosed to the Defendant one month before the commencement of this assessment hearing but again they did not opt to call an expert to prove it. The Plaintiffs already knew the expert valuation of the Defendant by this time. So, long before this valuation the Plaintiffs were aware of the Defendant's exert report on valuation, yet decided not to prove their valuation at hearing.

211. The Defendant produced a valuation and also called the expert to give evidence.

212. The Defendants rejected the rental capitalisation method, which works by allocating an annual rate per metre of floor area, then capitalising the rental at a suitable rate adopted by the Plaintiffs' valuation.

213. The building had no real rental, and it was not possible to identify a rental value for this building alone considering the location. This was located in coastal area inside industrial site. The building was one of the closely integrated one on an industrial site which shared

lot of amenities. The buildings were located very close, so it was not clear whether one building could be isolated and rented in terms of local laws and regulations.

214. The rental of the whole industrial site would have been a better option if the rental capitalization method was adopted, but then the rental for said building should be appropriately factored for the valuation. Even this would not be the best method for considering indemnity value for the said building.

215. The value arrived by the rental capitalization for the building destroyed was artificial, and also unrealistic. No evidence was produced as to the adoption of this method when there was no separate existence of the said building from the closely integrated manner in which they were situated. The electricity and other amenities had to be shared with the industrial site and there was no separate entrance or access to this building though it was situated next to a main road. So, if this was going to be rented first it should have necessary access and whether that would conform to local government regulations were not discussed in the report.

216. At the same time sharing electricity from a transformer that supplied to an industrial site will also have to be considered. The corruption of electricity wave from such heavy machinery needed to be considered as the tenants might have to use some additional safeguards for the electricity supply from power fluctuations as well as other effects from such an industrial location. The noise, odour, smoke and other factors like constant movements of men and material would also be considered by any prospective tenant. These factors would affect rentals and commercial market rentals for the area cannot be applied without suitable correction. It should also be noted that without this building the soap making industry could not function and considering the closely integration the renting of the building was unrealistic and hypothetical.

217. The above factors were not considered in the Dunlop Stewart valuation. Considering all the factors there was any other in fact this hypothetical approach simply shows that the rental capitalisation method had its limits, as in this case.

218. Mr. Horsely supported the Defendant's position in rejecting the valuation by Dunlop Stewart. Mr. Horsely in referring to the Dunlop Stewart Valuation at paragraphs 28 to 30 said:

> *29.They were wrong to approach their market value of the single building when it was integral to the business operating across the entirety of the site and that as a stand-alone building in the words of the Public Works Act 1981the part is (was) of a size, shape, or nature for which there is no general demand or market.*
>
> *30.Put simply were they to have undertaken a market value approach to the assessment of indemnity Dunlop Stewart should have valued the entire property before the loss and again after the event where the loss suffered would have been the difference between the two valuations.*

219. Mr. Horsely gave evidence in support of his contention and he was cross examined by the counsel for the Plaintiffs. Mr. Godfrey used the replacement less depreciation method to arrive at the adjusted indemnity value of $367,752.00. The building's main purpose was to protect the industrial plant within it. Mr. Godfrey evidence, supported by Mr. Horsely was that plants were frequently valued on this basis, and there was no reason the building cannot be also valued this way to accurately represent its remaining life.

220. In determining the indemnity, the Defendants instructed Rawlinson Jenkins to measure indemnity value of the building as it was, but new. The replacement cost was established from Rawlinson Jenkins Fiji: pages 122-123 of Defendant's Exhibit 5. Godfreys then adjusted this costing - Defendant's Exhibit 5 at Page 121 - to exclude items not relevant to the building before adding back margin and preliminaries, which are percentage costs. Godfreys then applied depreciation at 2.75% on a diminishing value basis.

221. The Defendant calculated the resulting replacement cost as $945,362, and indemnity value $367,752. The adjusted building claim of the Defendant was as follows: - Defendant's Exhibit 5 at page 121 –

Indemnity adjustment on building **Rawlinson & Jenkins costing**	
Total Cost	1,112,392

less			
Less VAT		-123,599	
		988,793	
Preliminaries		-65,604	
		923,189	
Contingency		-50,000	
		873,189	
margin		-53,139	
		820,050	
Heating and ventilation	in plant	-22,500	
Electrical services	in plant	-11,800	
		785,750	
Plus Margin	6%	47,145	
		832,895	
Plus preliminaries	7.5%	62,467	
Plus Contingency		50,000	
		945,362	Depreciated at 2.75% of diminishing value On a sectional age basis
	Final cost	**945,362**	

Built:	**Life**		Formula	Value **Cost**	Residual Depn rate **Section ppn**	**2.75%**	
1950	60	53	30.7%	251,141	25.4%	0.23092	57,992
1965	60	38	37.4%	305,644	30.9%	0.34688	106,022
1970	60	33	31.8%	259,750	26.2%	0.39727	103,192
1995	60	8	Blg rate	128,449	17.5%	.78277	100,546
				945,362			**367,752**

222. Mr. Horsely stated that a market value could not be ascribed to a distinct asset that had no market on its own and supported the decision to find the indemnity value of the building using the replacement less depreciation. I accept Mr. Horsely's evidence and the valuation based on depreciation method, as the building had no separate existence and heavily depended on the site.

223. Mr. Horsely also confirmed that the rates of depreciation used by Godfreys at 2.75% per annum on diminishing value of the elemental components of the building were reasonable in the circumstances of an industrial building located in a Pacific Island location.

224. Mr. Horsely however opined that Godfreys should have included for costs that were excluded from Rawlinsons elemental analysis such as professional fees, permit costs etc. Mr. Horsely suggested a high percentage of 12% to the replacement cost increasing the sum to $1,058,805 and a resulting depreciated replacement cost of **$411,875**.

Punjas Charity Trust – Stock $49,803 & Loss of turnover - $23,394

225. This claim raises the question of interpretation of the policy wording in the context of the surrounding circumstances. Punjas Charity Trust carried on the business of manufacturing candles and incense sticks using machinery owned by the insured, Ocean Soaps Ltd, from the Ocean Soap factory destroyed by the fire. Its products were distributed by insured. The Defendant was aware of this operation by as admitted by Mr Godfrey in cross examination.

226. The Defendant was aware of the risks associated with such venture and if they did not make provision for the risk it was their fault. The word "Business" was defined in the policy at p.4 Tab 7 as "all businesses of whatsoever kind conducted by the insured" and includes "soap & allied products" and "*religious organisation*" and Punjas Charity Trust was the only religious organization carrying on business at that industrial site. So the intention of the parties was clear to include said religious trust under the insurance cover. If not the word 'religious organization' had no meaning.

227. A trustee was entitled to insure trust property in the trustee's name according to s.42(1) Trustee Act (Cap.65) which states as follows:

> *42.-(1) A trustee may insure against loss or damage, whether by fire or otherwise, any insurable property to any amount, including the amount of any insurance already in being, not exceeding the full replacement value*

> *of the property; and may also insure against any risk or liability against which it would be prudent for a person to insure, if he were acting for himself; and may pay the premiums for such insurance out of the income of the property concerned or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to that income.*

228. In **Lucena v Craufurd** (1806) 127 ER 630 Lord Eldon said at p.651: "*A trustee has a legal interest in the thing and may therefore insure*". The "Insured" named in the policy were several companies, individuals and trusts "*and all subsidiary companies or any of them for their respective rights and interests*".

229. The words contained in the Insurance Policy "*......or any of them for their respective rights and interests*" refer to each named insured or only to the subsidiary companies or any of them. This will invariably include the said religious trust.

230. The words "*for their respective rights and interests*" are commonly used to describe a composite insurance policy. Mr Godfrey did not say in his evidence that he had considered whether the policy was a composite policy or that he had considered the meaning of the words "*for their respective rights and interests*" in the context of a composite policy. He clearly did not. Had he done so, he would not have said the wording was 'unusual'. Even assuming that it was unusual it was the Insurance Policy that they accepted premiums for number of years. By conduct the Defendants have accepted the said wordings and the meaning attached to it.

231. In ***General Accident Fire and Life Assurance Corporation Ltd v Midland Bank Ltd*** (1940) 2 KB 388 the English Court of Appeal had to deal with the phrase "*for the respective rights and interests*" in the context of whether the policy was a joint policy or a composite policy. Sir Wilfred Greene MR said:

> At page 404-405:
> "*That there can be a joint insurance by persons having a joint interest is, of course, manifest. If A and B are joint owners of property — and I use that phrase in the strict sense—an undertaking to indemnify them jointly is a true contract of indemnity in respect of a joint loss which they have jointly suffered. Again, there can be no objection to combining in one*

insurance a number of persons having different interests in the subject-matter of the insurance, but I find myself unable to see how an insurance of that character can be called a joint insurance. In such a case the interest of each of the insured is different. The amount of his loss, if the subject-matter of the insurance is destroyed or damaged, depends on the nature of his interest, and the covenant of indemnity which the policy gives must, in such a case, necessarily operate as a covenant to indemnify in respect of each individual different loss which the various persons named may suffer. In such a case there is no joint element at all."

Later on at p.405:
"…………………Such a policy, in my judgment, may be more accurately described as a composite policy, because it comprises, for reasons of obvious convenience, in one piece of paper the interests of a number of persons whose connection with the subject-matter of the insurance makes it natural and reasonable that the whole matter should be dealt with in one policy. …….."

And at page 406:
"The description of the insured by name, followed by the words, "for their respective rights and interests," in my judgment, read in its natural sense, indicates that these three persons, having interests which it is not material to investigate for the purpose of the document, are minded to combine in one policy and each of them to obtain cover from the underwriters in respect of his right or interest, whatever it may be — and it may vary from time to time…………………"

232. In considering the meaning of the phrase "*for the respective rights and interests*" the Master of the Rolls in ***General Accident Fire & Life*** (supra) said:

At p.406:
"But, of course, the document must be construed as a whole, and what seems to me to be the meaning of that phrase might have to yield to other indications in the document if that were necessary to produce a proper and fair construction of it."

And at page 408:
"The printed words "the insured" must be construed and qualified by the words "for their respective rights and interests," and those printed words must be given a construction which will fit in with the essential nature of the contract which is being undertaken."

And at Page: 409:
"The true construction of the words again, in my judgment, must be moulded by reference to the governing phrase "for their respective rights and interests" and given a businesslike effect in consequence".

233. Mr. Godfrey stated his evidence in his reasoning as follows in his written statement of evidence:

> *"129. If the Punja Charity Trust is insured solely because Mr Jagdish (Jagjiwan) Punja is insured, then by implication, every interest of his or any named insured, of any nature would be insured. The insurance market would not accept insurance proposals on these terms as it would not be able to identify and measure in any meaningful way what it was insuring, and it is fundamental to an insurance policy that that the subject matter of the policy is identifiable by all parties.*
>
> *130. I add that Mr Jagdish (Jagjiwan) Punja is most likely to hold his own insurances for other property. The error in this case is that, having gone to such trouble to specify every party whose interests it intended to insure, the insured did not name this one."*

234. The subject matter of the policy included the business of manufacturing candles and incense sticks, for charity, inside the soap factory and the risks associated with it. It was not totally alien to the industry as the by produces were used for the said industry, and this kind of business integration was not an uncommon thing, and importantly the Defendants were aware of it.

235. The Defendant was aware of that business and risk because it knew such manufacturing was being done on the premises and the reason for including a religious body in the Insurance Policy was to extend the cover to said activity and machinery involved in it.

236. The Defendant agreed to the definition of business stated in the policy which included soap and allied products and religious organization. If the Defendant was not aware of the said Punjas Charity Trust, why did it include a 'religious organization' under the 'Business' in the Insurance Policy. It was the only religious organization that functioned on business at the industrial site.

237. In ***<u>Norwich Union Fire Ins. Society Ltd. v. Traynor</u>*** [1972] NZLR 504 (C.A.) Woodhouse J said at 509 line 28:

> *"There is no general rule that an insured is under an obligation to disclose the precise nature or extent of his interest in the property".*

238. Earlier Bowen LJ had said in ***Castellain v Preston*** (1883) 11 QBD 380 at 398:

> *"It is well known in marine and in fire insurances that a person who has a limited interest may insure nevertheless on the total value of the subject-matter of the insurance, and he may recover the whole value, subject to these two provisions; first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and secondly, he must intend to insure the whole value at the time. When the insurance is effected he cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure.*
>
> *... .....*
>
> *. . . let us turn to the case of a mortgagee. If he has the legal ownership, he is entitled to insure for the whole value, but even supposing he is not entitled to the legal ownership he is entitled to insure prima facie for all. If he intends to cover only his mortgage and is only insuring his own interest, he can only in the event of a loss hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover" (ibid, 398-399)."*

239. In the Insurance Policy, Mr Jagjiwan Punja *"for his respective rights and interests"* meant rights and interests of his own and as trustee of Punjas Charity Trust. He had an insurable interest in the property and business of Punjas Charity Trust as a trustee. As such he also had "relation to or concern in the subject matter of the insurance", of Punjas Charity Trust, namely, in its business of manufacturing candles and incense sticks, and it was permanently situated at the same place of business that was insured as a 'religious organization'.

240. In the definition of 'Business' for the business interruption claims the manufacture of ' incense sticks' was specifically included though candles were not included in the said definition. But it can be considered as 'allied product' of soap industry. So for the business interruption the Punjas Charity Trust operations were included. This supports that the material damage also covered though not specifically mentioned by its name. It was common ground that the machinery used for Punjas Charity Trust was situated at

the site destroyed by the fire and the amount of damage was not disputed. In the light of that in my judgment the said claim of Punjas Charity Trust should be allowed as an insured item under the Insurance Policy.

241. The next issue was the proof of the damage to said entity on indemnity basis. The Defendant did not dispute the amounts **$49,803** for the stock that was destroyed and **$23,394** for the business interruption. So I allow the said claims.

Interest

242. The Plaintiff seeks interest on a compounded basis. It claims compounded interest pursuant to Regulation 2(3) of the Insurance Law Reform (Interest Rates) Regulations 2004.

243. It is the Defendant's position that Regulation 2(3) of the Insurance Law Reform (Interest Rates) Regulations 2004 is ultra vires Section 34 of the Insurance Law Reform Act, 1996.

244. Section 34 of the Insurance Law Reform Act 1996 provides as follows:

PART VII – INTEREST AND REGULATIONS

Interest on claims

> *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.*

245. Regulation 2(3) of the Insurance Law Reform (Interest Rates) Regulations 2004 says:

> *(3) The interest accrued to the end of each calendar month is to be added to the amount on which interest is payable under section 34(1) of the Act and bears interest from the first day of the next succeeding calendar month.*

246. In terms of Section 34(3) of the Insurance Law Reform Act 1996, the regulation needs to be made to determine the rate of interest. The Regulation 2(1) of the Insurance Law Reform (Interest Rates) Regulations 2004 dealt with the interest rate and it was 10% P.A. The said regulation not only dealt the issue of interest but also stated that it should be monthly compounded interest (see Regulation 2(3) of the Insurance Law Reform (Interest Rates) Regulations 2004). So obviously this was not a matter that was delegated for making of the regulations.

247. A statutory regulation must be "within the four corners of" of the statute (see ***Carltona Ltd v Commissioners of Works*** [1943] 2 All ER 560 (CA) at 564 per Lord Greene MR. It should also be "capable of being related to" the main statue. (see ***A-G (Canada) v Hallet & Carey Ltd*** [1952] AC 427 (PC) at 450 per Lord Radcliffe), the powers of legislation so delegated.

248. In ***McEldowney v Forde*** [1971] AC 632 (HL) at 658(E-F), Lord Diplock laid down a three-step test for the courts:

> *"First, to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorised to make, secondly, to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description."*

249. In ***Carroll v Attorney-General*** [1933] NZLR 1461 (CA) at 1478, Ostler J stated:

> *"The principles upon which the Court determines the validity of regulations made by Order in Council are well settled ... [The Courts] merely construe the Act under which the regulation purports to be made giving the statute ... such fair, large and liberal interpretation as will best attain its objects. Then they look at the regulation complained of. If it is within the objects and*

intention of the Act, it is valid. If not, however reasonable it may appear, or however necessary it may be considered, it is ultra vires and void ... The objects and intention of the Act can, of course, be gathered only from the words used."

250. Section 34(1) of the Act imposes on insurance companies a duty to pay interest on unpaid amounts owing under contracts of insurance. Section 34(2) prescribes the period for which interest is to be paid, and section 34(3) prescribes the rate of interest as fixed by regulations made under section 35.

251. The Defendant accepted that the rate of interest prescribed by Regulation 2(1) of the Insurance Law Reform (Interest Rates) Regulations 2004 interest rate of 10% per annum. It should not be compounded as the Insurance Law Reform Act 1996 does not speak about a compound interest. So the issue of compounding it monthly will not arise as stated in the said Regulation.

252. The scope of the Regulations made in terms of Section 35 of the Insurance Law Reform Act 1996 cannot be more that was prescribed in terms of Section 34(2) of Insurance Law Reform Act 1996. In the absence of any provision making the interest a compounded one in the Insurance Law Reform Act 1996, the regulation cannot change it to the compounded one.

253. The next issue is when the interest rate of 10% starts to accrue under Section 34(2) of the Act. The Section 34 (2) states:

> *(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.*

254. In ***Bankstown Football Club v CIC Insurance Ltd*** (Unreported, Supreme Court of New South Wales, Coles J, decided on 17 December 1993) the Supreme Court of New South

Wales held that the date on which the interest starts to accrue must be determined objectively when discussing the principles to applied when considering "the day as from which it was unreasonable for the insurer to have withheld payment of the amount..." under Section 57 of the Insurance Contracts Act, 1984. Section 34 of the Insurance Law Reform Act, 1996 has exactly the same wording as Section 57 of Australian Insurance Contract Act, 1984.

255. In ***Sayseng v Kellogg Superannuation Pty Ltd*** *[2007] NSWSC 857*, Nicholas J observed At paragraph [7]

> *"In my opinion it should now be accepted that the correct approach to be taken by the court on this question is that taken by Cole, J in Bankstown Football Club. In my assessment, the cases to which I have referred* ***establish that the question of reasonableness*** *is to be judged by reference to the true position in respect of the claim with allowance to be made for the* ***insurer to have a reasonable period of time within which to investigate the claim and to consider its position****. The discretionary determination is to be made having regard to the particular circumstances of the case, including the probable issues which require investigation. Under the Act* ***the court is not required to evaluate and pronounce upon the opinion or decision-making process of the insurer****. It is not relevant that the insurer acted bona fide in denying the claim, or when the judgment of the court established the insurer's liability to pay it. In short, the award will be calculated on the basis of what the court finds is a reasonable time for completion of the insurer's investigation of the claim.* ***Put another way, in my opinion, the insurer is not automatically liable to pay interest from the day on which it became liable to pay to a person an amount under a contract of insurance.*** *Under s.57 (2) liability to pay interest is to be calculated with regard to the day on which it was unreasonable for the insurer to withhold payment of the amount after it had become liable to pay it in response to a claim."*

256. The Insurance Policy contained two distinct parts under which the claims were made. They were MD and BI. The BI claim was by its nature, a loss that occurs over time, not on the date of the fire, but the insurance policy did not make a distinction of the two types of claims as regards to the interest.

257. All the claims should be settled as soon as possible and if not interest should be applied to assessed amount considering the circumstances of the case. This case involved a substantial claim. First the Defendants imposed the restriction applicable stating that the fire was caused by a malicious act of the Plaintiffs, but was not successful. Considering the circumstances of the case, both parties had resorted to ascertain the loss through the engagement of professionals in the insurance industry. So a claim preparer and lost adjuster were employed by respective parties to the action. This process could not resolve the main issues between the parties relating to the substantial claims, but some claims were resolved. Even at the hearing of the assessment Plaintiff could not prove on the balance of probability main disputed claims.

258. The court needed to calculate the interest from ***'the day as from which it was unreasonable for the insurer to have withheld payment.'*** As submitted by the Defendant in their written submission, the guiding principle was the reasonableness in the refusal to pay what was due to the Plaintiffs. Considering the circumstances of the case in my judgement that interest should accrue from the date of determination of liability in this action.

259. Generally, assessment of liability and assessment of damages would not be separated and would be decided simultaneously. By adopting to have a split trial, this advantage should not be denied to the Plaintiff. After the determination of liability there was no application of malicious act restriction.

260. According to the Section 34 of the Insurance Law Reform Act 1996, there was no distinction of type of claim contained in a policy the interest rate 10% was applicable to entire amount from the date of determination of liability. (i.e from 6 May 2011) It should be noted that the Plaintiff had received as part payments 3.75 million prior to that date and this sum should be deducted from the total assessed damage for the application of interest.

261. It should also be noted long before this date the parties have tried to settle the claims and had also agreed certain claims, but no payments regarding the said claims were settled by the Defendant. So the Defendant had unreasonably held claims due to the Plaintiff for a considerable time period. It was not my duty to evaluate the insurance claim payment process, but the time taken was too long and the Defendant had stopped the process of engaging professionals. There was no communication produced in the court indicating termination of the engagement of lost adjuster to the Plaintiff. This behaviour also supports unreasonable for the Plaintiffs to recover their claims for the loss early.

262. In my judgment the date of interest should be from 6th May, 2011 for the reminder of entire claim till it is fully paid (or if paid by post when posted such payment).

263. The policy has at page 28 (Folder 2, Tab 7) it states:

> *"In the event of loss or damage giving rise to a claim under this Policy, the Company* ***will make progress claim payments on production of acceptable evidence of insured loss.***
>
> *"Provided that, if the aggregate of progress payments exceeds the total amount of the adjusted loss, the Insured will immediately refund the difference between the amount of adjusted loss and the aggregate of payments actually made."*(emphasis added)

264. The Defendant contends that the above clause contemplates that payments were to be made in the aggregate, not against specific items. I do not agree. If so why did they pay a part payment? The test was reasonableness of the non payment of Defendant for the claims already settled between the parties. There was nothing preventing them paying the amount according to their adjustments, leaving disputed amount to be settled through other means including litigation.

265. The Insurance Policy at the beginning stated that each party has to be considered separately.(see page 2 of the Insurance Policy). So claims needed to be considered separately and the aggregate of claims can be paid till the determination of the rest through ADR, or by a civil action.

266. While considering when any payment was due, under cross examination Mr Daniel Yee, the insured's broker said that in his experience, insurance companies pay within weeks. This was a more generalized statement. However in cross examination he accepted that he was dealing in a fire claim that was still under investigation after six months.

267. The policy has (page 21 – CLAIMS conditions, Section 2 (d)) a requirement that the Insured produce such records:

Upon becoming aware of the happening of any Damage, the Insured must –

> *(a) immediately notify the Company,*
>
> *(b) use due diligence and do and concur in doing all things reasonably practicable to minimise any interruption of or interference with the Business and to avoid or diminish the loss;*
>
> *(c) as soon as is practicable, deliver to the Company a statement in writing of any claim certified by the Accountant, whose reasonable fee will be paid by the Company, with all particulars and details reasonably practicable of the loss;*
>
> *(d) produce and furnish all books of account and other business books, invoices, vouchers and other documents, proofs, information, explanations and other evidence and facilities as may reasonably be required and verification of the claim and, if required, a statutory declaration in verification of the particulars.*

The term "Accountant" under this condition means an accountant or adjuster whose qualifications are acceptable to both the Company and the Insured, and is appointed by both the Company and the Insured.

268. The Defendants contended that, that any payment was due prior to the submission of investigation records in October, 2004. I do not need to consider this argument as I have awarded interest from 2011, that was nearly 7 years after said submissions of the records.

Business Interruption (BI) Claim

269. The above mentioned claim was different from the other claims on number of ways. First, it was not to be assessed on indemnity basis as on Material Damage. The other important feature was that it was on full value basis, for future loss of business after the event, and the limits were specifically mentioned. For the claim preparation a cost of maximum 200,000 was allowed and additional expenditure was limited to 500,000 for any one event, was allowed under BI.

270. Both parties have adjusted the BI claim to arrive at 1,991,358. In Mr. Fair's evidence one remaining issue was the additional costs incurred by MSM Loss Management Limited, in attending a meeting with the Defendants due to the non availability of the Plaintiffs directors at that meeting. This was requested by the Defendants, but from the evidence it was on behalf of the Plaintiff that they had attended. If the MSM Loss Management wanted their fee for attendance being paid by the Defendant, they should have indicated that to them before the meeting as they were retained by the Plaintiffs and not by the Defendant.

271. I have included Punjas Charity Trust under the Insurance Policy hence 23,394 was the loss turnover from that should be allowed.

272. If there was an outstanding issue of payment at that time it would have been informed, and resolved at that time. Before attending the meeting MSM Loss Management would have obtained some authority from their clients the Plaintiffs and they had appeared on behalf of the Plaintiff as their representatives. So I do not allow that expenditure.

273. There was an addition claim of Increased Cost of Working (ICW) claimed by the Plaintiff under BI, for a sum of $44,973. This was not proved at hearing by the Plaintiff (see Tab 13 & 14 of folder 2).

274. If VAT is applicable for BI and MD claims that should also be paid by the Defendant. I can't see applicable VAT exceeding the limits for BI or MD, but for completeness these should be limited for said limitation.

Breach of Contract

275. The Plaintiff also claims for breach of contract. The Plaintiffs state that there was an unreasonable delay in admitting liability under the policy and making progress payments under the policy. The Plaintiff also states that the invoking of malicious damage limitation was also a breach of contract.

276. The Plaintiffs action was based on a report prepared by insurance investigator employed by them. If they did not resort to malicious damage exception there would have been a danger of reinsurers refusing to pay the claims. The actions of the Defendant to apply the exception and limit the liability, cannot be considered unreasonable.

277. The Plaintiffs soap factory got destroyed and progressive payments were paid in the following manner(see Tab 3 of the Plaintiffs Folder 2)

Date		Amount
19/6/2003	-	1,000,000
4/7/2003	-	500.000
11/4/2003	-	500,000
28/8/2003	-	1,000,000
24/11/2003	-	250,000
20/5/2004	-	500,000
Total		3,750,000

278. The Defendant had paid a sum of 3.75 million in progressive payments by 20th May, 2004. So progressive payments of over 3 million were paid to the Plaintiff within one year of the destruction. Considering the nature of the claim and the manner in which the proof of the damage I cannot say that there was a breach of contract due to delay in payment or resorting to malicious damage limitation.

Final Calculations

Item	Description	Plaintiff's claim	Defendant's position	The final assessment by Court
1	Office/Laboratory	178,031	178,031	178,031
2	Minor Lines	35,138	30,830	30,830
3	Toilet Soap	1,424,235	855,764	855,764
4	Laundry Soap	318,534	237,019	237,019
5	Other Areas	163,614	155,729	155,729
6	Consumable Stocks	16,797	16,797	16,797
7	Demolition	50,000	31,111	31,111
8	Contingency – General	Incl.	30,000	30,000
9	Professional fees	149,807	153,325	153,325
10	Europe Trip	30,000	30,000	30,000
11	MM Costs	30,000	30,000	30,000
12	Computer Allowances	Incl.	15,500	15,500
13	Salvage	0	(30,000)	-
14	All services except Electrical	317,677	253,327	253,327
15	Electrical Services	397,875	132,660	132,660
16	Personal Effects	1,350	0	-
17	Building	650,000	367,752	411,875
18	Stock	1,091,517	1,041,714	1,041,714+49.803*
19	Amounts that were needed to add (see paragraph 200, 201 of the Decision)			
	Electricals			7,321
	Engineering Fees			10,500
	Deductible	(10,000)	(10,000)	(10,000)
		4,844,575	**3,519,559**	**3,661,306**
20	Business Interruption	**2,069,675**	**1,991,358**	**1,991,358+23,394***
	Total	**6,914,250**	**5,510,917**	**5,676,058**
	Less part payments by Defendants			**(3,750,000)**

*Punjas Charity Trust

Costs

279. Both parties were successful to some extent at this hearing. Considering the circumstances in my judgment each party should bear their own cost.

280. For avoidance of any doubt this decision should be considered as a decision of the Master on assessment of damages as agreed by all the parties at the continuation of the assessment before me on 2nd April, 2013.

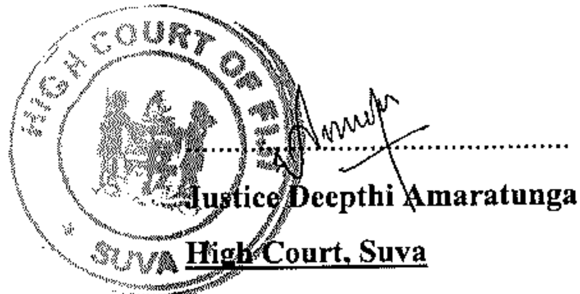
FINAL ORDER

a. The Defendant to pay the Plaintiffs a sum of 1,926,058 and interest at the rate of 10% P.A from 6th May, 2011.

b. Applicable VAT for (a) should be paid by the Defendant for the above sum.

c. Considering the circumstances of the case I will not grant costs. Each party to bear their own costs.

Dated at Suva this 24th day of March 2016



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Justice Deepthi Amaratunga
High Court, Suva