

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 260 of 2016

BETWEEN : **RAJEND SINGH AND SUDESH SINGH** both of Melbourne,
Australia trading as **HIZZ & HERS**

PLAINTIFFS

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

DEFENDANT

Appearances : **Mr.Iqbal Khan with (Ms)Sabrina Khan for the
plaintiffs.**
**Mr. Shailend Krishna with Mr. Nilesh Kumar for the
defendant.**

Date of trial : **Monday, 04th March, 2019**

Date of Judgment : **Friday, 12th July, 2019**

JUDGMENT

(A) INTRODUCTION

- (1) By writ issued on 07th December, 2016, the plaintiffs seek judgement against the defendant – insurance company to recover *inter alia* a sum of \$150,000.00 under a fire insurance policy, general damages, and compensation. The plaintiffs' cause of action is based on breach of implied conditions or in the alternative, breach of the provisions in Fair Trading Decree. The plaintiffs also allege that they suffered loss and damage due to the inaction or delayed action of the defendant.
- (2) The defendant (New India) refutes the claim principally on the basis that the cause of the fire was arson, committed by the first named plaintiff to fraudulently gain benefits from the fire insurance policy.

(B) THE FACTUAL BACKGROUND

- (1) The statement of claim which is as follows sets out sufficiently the facts surrounding this claim from the plaintiffs point of view as well as the prayers sought by the plaintiffs.

1. THE Plaintiffs were:

(a) *At all material times a prosperous business people trading under the name and style of HIZZ & HERZ at Shop No.3, Maji Jadavji Building, Main Street, Nadi Town.*

2. THAT *the Defendant is, and was at all material times, a foreign company duly incorporated under the laws of India and having its principle place of business in Fiji at Suva and carrying on business in Fiji as insurance underwriter.*

The Policy

3. THAT *by a policy of insurance No. 1123/10044180/000/00 dated 15th November 2012 made by the defendants in consideration of premiums paid and to be paid to them by the Plaintiffs, the defendants insured the plaintiffs against loss or damage by fire on Shop No. 3, Manji Jadavji Building, Main Street, Nadi Town on Plaintiff's Stock in Trade and Business Furniture Fixtures and Fittings for a sum of \$150,000.00.*
4. THAT *the insurance policy was renewable every year and was valid when the fire took place.*
5. THAT *at all material times, the plaintiffs were interested in the shop and the contents to the extent of the amounts so insured thereon respectively.*
6. THAT *the Plaintiff's Stock in Trade and Business Furniture Fixtures and Fittings were insured for a maximum sum of \$150,000.00.*

THE LOSS

7. THAT *on the 14th day of January, 2013, whilst the policy was current, the Plaintiff's shop and the contents were destroyed by fire.*
8. THAT *as a result, the Plaintiff suffered a loss and damage to the extent of \$150,000.00 being the cost of the Stock in Trade and Business Furniture Fixtures and Fittings. Full particulars of loss and damage were supplied to the defendants.*

9. THAT on or about the 13th day of February, 2013 the Plaintiff's had claimed under the said Fire insurance Policy for the fire insurance to the Defendant for the stock, furniture and fittings which was insured for the sum of \$150,000.00 (One hundred and Fifty Thousand Dollars).
10. THAT on or about the 17th day of December 2015 the Defendants rejected the Plaintiffs said claim for fire insurance in the sum of \$150,000.00
11. THAT on or about the 11th day of January 2016 the Plaintiffs thereafter made further requests to the defendants to reconsider the Plaintiffs claim on the basis that the said fire was not caused by the Plaintiffs and that the defendants are liable under the said Policy to compensate the Plaintiffs.
12. THAT on the 6th day of September 2016 the Defendants advised the Plaintiffs that they still maintained their earlier stand and as such rejected the Plaintiffs said claim.
13. THAT despite the fact the Plaintiffs duly notifying the Defendants loss and damages but, wrongfully and in breach of contract, the defendants have not paid the plaintiffs the sum of \$150,000.0 or any part thereof.
14. THAT AS a result of the said fire to Plaintiff's said stock, furniture and fittings the Plaintiffs have suffered complete loss of their business.
15. THAT the Plaintiff's business was closed from 14th January 2013 till to date.
16. THAT the Plaintiffs could not restart their business because the Plaintiffs did not receive monies from the defendants for the fire claim.
17. THAT the Defendants despite several requests has failed, refused and/or neglected to indemnify the Plaintiff under the Insurance Policy in respect to damage sustained to the Plaintiff's said stock, furniture and fittings in the fire on 14th day of January, 2013 in breach of the contract of Insurance between the Plaintiff and the Defendant.
18. THAT FURTHER or in the alternative, it is an implied term of the Insurance Policy that the defendant act swiftly or have systems in place to allow swift processing of claim under the Insurance Policy to minimise loss and damage to the insured.
19. AS a result of the defendant's failure to proceed the Plaintiff's claim swiftly the Plaintiff has suffered loss of income and damages which is to be quantified at the date of trial.

20. FURTHER or in the alternative the Defendant engaged in misleading and deceptive conduct in breach of the provisions of Fair Trading Decree.

PARTICULARS OF BREACH

Defendant whether by itself, its agents or Representative represented to the Plaintiff that it will process the Plaintiff's claim swiftly and expeditiously and would indemnify the Plaintiff for any damage of loss sustained by the Plaintiff in respect to perils covered by the Insurance Policy.

21. THAT although all information requested by the defendants loss assessor was provided by the plaintiff, the Defendant has denied liability under the policy and has wrongfully and in breach of the terms of the insurance contract:

- (a) Failed to determine the claim within a reasonable time;*
- (b) Failed to pay the Plaintiff's claim of \$150,000.0;*

- (2) The plaintiffs claim from the defendant.

- a) A sum of \$150,000.00 being the amount covered by the Insurance Policy.*
- b) General damage for breach of contract.*
- c) Losses and Damages arising out of loss of business.*
- d) Compensation under Section 127 of the Fair Trading Decree.*
- e) Interest on the sum of \$150,000.00 at the rate of 13% per annum from January 2013 to the date of judgment.*
- f) Cost of this action on Solicitor/Client basis.*
- g) Such further or other relief as this Honourable Court deems just.*

- (3) The defendant in its statement of defence pleaded, *inter alia*;

- 1) That the Defendant refers to the paragraph 1 of the Statement of Claim ("Claim") and admits that the Plaintiff were operating a business trading as HIZZ & HERZ at Shop No.3, Manji Jadavji Building, Main Street, Nadi Town.*
- 2) That the Defendant refers to paragraphs 2, 3 and 4 of the claim and admits the contents of the same.*

- 3) *The Defendant refers to paragraphs 5 and 6 of the claim and says that the Defendant is unaware of the same and as such can neither deny nor admit the contents of it. The Defendant puts the Plaintiff to the strict proof of the same.*
- 4) *The Defendant refers to paragraph 7 of the claim and admits that there was a fire on 14th day of January, 2013 at Shop No.3, Manji Jadavji Building, Main Street, Nadi town and the Shop of the plaintiff were destroyed and denies all other allegations and put Plaintiff to the Strict proof of the same.*
- 5) *The Defendant refers to paragraph 8 of the claim and says that the Defendant is unaware of the same and as such can neither deny nor admit the contents of it. The Defendant puts the Plaintiff to the strict proof of the same.*
- 6) *The Defendant refers to the paragraphs 9 and 10 of the Claim and admits that the Plaintiff had claimed under the Fire Insurance Policy for the fire insurance and same was rejected by the Defendant.*

The Defendant further says that the reason for rejection was that the Investigation Report of the National Fire Authority, Forensic Consulting Services PTY LTD and Appral's Private Investigation states that the suspected cause of fire is as follows; "It was suspected that fire was deliberately lit inside the shop using accelerants causing a vapour explosion due to the fact there was not enough space for flammable vapours to escape". The NFA had further stated that police should carry out further investigation on this case as this can be more than a deliberate burning gone wrong.

The Forensic Analysis states that there is no evidence of any accidental ignition mechanisms. It was evident from the investigation that the fire did not occur due to any accidental circumstances.

- 7) *That the Defendant refers to paragraphs 11 and 12 of the claim and admits the contents of the same.*
- 8) *The Defendant refers to the paragraph 13 of the claim and denies the allegation therein and puts the Plaintiff to the strict proof of the same.*

The Defendant further says that it has not breached any terms and conditions of the contract and in fact complied the same by carrying out its proper investigation in the matter.

- 9) *The Defendant refers to the paragraphs 14, 15 and 16 of the claim and says that the Defendant is unaware of the same and as such can neither*

deny nor admit the contents of it. The Defendant puts the Plaintiff to the strict proof of the same.

- 10) *The Defendant refers to the paragraph 17 of the claim and denies the allegation therein and puts the Plaintiff to the Strict proof of the same and further repeats the paragraph 8 herein.*
- 11) *That the Defendant refers to paragraph 18 of the claim and admits the contents of the same and further says that the Defendant at all material time have acted swiftly and have systems in place to allow swift processing of claim under the insurance Policy.*
- 12) *That the Defendant refers to paragraph 19 of the claim and denies the allegations and puts the Plaintiff to the Strict proof of the same and repeat paragraph 18 herein.*
- 13) *That the Defendant refers to the paragraphs 20 and 21 of the Claim and denies the allegations therein and further puts the Plaintiff to the Strict Proof of the same.*

The Defendant further says that it has not breached the provisions of Fair Trading Decree neither has breached the terms and conditions policy. The Defendant at all material time has acted swiftly and has complied the provisions of the Fair Trading Decree.

- 14) *In the alternative and without prejudice to the foregoing Defence, the defendant says the fire was suspected to be deliberately lit inside the shop using accelerants causing a vapours explosion due to the fact there was not enough space for flammable vapours to escape and most like it was deliberately started using a flammable liquid accelerant that was spread on clothing on the display rack at the front of the shop as there was no evidence of any accidental ignition as stated in the forensic investigation report. The only reasonable presumption and circumstances is that one of the Plaintiffs with the knowledge of the other carried out the act of arson as the business was not making money and/or returns as reasonably expected by an overseas investor and/or by any investor.*

In the premises the plaintiff is not entitled to maintain and is barred from making his claim herein.

- 15) *In the alternative and without prejudice to the foregoing Defence, the defendants says the fire was deliberately set by the Plaintiff as the Plaintiff has failed to give the valid reasons as to what he was doing in the shop at 12.50am and the forensic report states that the most likely the fire was deliberately started using a flammable liquid accelerant that was spread on clothing on the display rack at the front of the shop. It is*

evident that no one in the shop has entered except Plaintiff and another person and there is no evidence of accidental ignition by neither the NFA nor the Forensic investigators.

The Chemical analysis of the debris recovered from the floor after the fire revealed that there were the chemicals present in the debris found after the fire and it was most likely the components matched with the kerosene. The buckets were also placed at the back of the room and there was also an indistinct chemical odor associated with the bucket.

(4) Wherefore, the defendant prays;

That the Plaintiff's claim herein be struck out and dismissed with cost.

(5) The plaintiffs' reply to defence is as follows;

1. *THAT as to paragraph 1 of the Statement of Defence the Plaintiffs join issues with the Defendant.*
2. *THAT as to paragraph 2 of the Statement of Defence the Plaintiff join issues with the Defendant.*
3. *THAT as to paragraph 3 of the Statement of Defence the Plaintiffs rely on and repeat paragraphs 5 and 6 of their Statement of Claim.*
4. *THAT as to paragraph 4 of the Statement of Defence the Plaintiffs admit that there was a fire on 14th January 2013 which destroyed the Plaintiffs' shop and the Plaintiffs rely on and repeat paragraph 4 of their Statement of Claim.*
5. *THAT as to paragraph 5 of the Statement of Defence the Plaintiffs rely on and repeat paragraph 8 of their Statement of Claim.*
6. *THAT as to paragraph 6 of the Statement of Defence the Plaintiffs join issue with the Defendant that the Plaintiffs had claimed under the Fire Insurance Policy for the fire insurance and the said claim was rejected by the Defendant and the Plaintiffs deny the other allegations contained therein and put the Defendant to strict proof of the same.*
7. *THAT as to paragraph 8 of the Statement of Defence the Plaintiff rely on and repeat paragraph 13 of their Statement of Claim and deny the other allegations contained therein.*
8. *THAT as to paragraph 9 of the Statement of Defence the Plaintiffs join issue with the said paragraph.*

9. *THAT as to paragraph 10 of the Statement of Defence the Plaintiffs rely on and repeat paragraph 17 of their Statement of Claim and deny the other allegations contained therein.*
10. *THAT as to paragraph 11 of the Statement of Defence the Plaintiffs repeat that it was an implied term of the Insurance Policy that the Defendant act swiftly to allow swift processing of the claim but the Plaintiffs deny that the Defendant did act swiftly to process their claim under the Insurance Policy.*
11. *THAT as to paragraph 12 of the Statement of Defence the Plaintiffs rely on and repeat paragraph 19 of their Statement of Claim.*
12. *THAT as to paragraph 13 of the Statement of Defence the Plaintiffs rely on and repeat paragraphs 20 and 21 of their Statement of Claim and deny the other allegations contained therein.*
13. *THAT as to paragraph 14 of the Statement of Defence the Plaintiffs deny the allegation therein and put the Defendant to strict proof of the allegations contained in the said paragraph.*
14. *THAT as to paragraph 15 of the Statement of Defence the Plaintiffs deny the allegation therein and put the Defendant to strict proof of the allegations contained in the said paragraph.*
15. *SAVE as herein expressly admitted the Plaintiffs deny each and every allegation contained in the Defendant's Statement of Defence as if the same were set out herein and specifically traversed.*
16. *WHEREFORE the Plaintiff prays to this Honourable Court that the Defendant's Statement of Defence be dismissed with costs on Solicitor/Client indemnity basis.*

(6) The minutes of the pre-trial conference record, *inter-alia*, the following;

Agreed facts

1. *The Plaintiffs at all material times owned and operated a business trading as HIZZ and HERZ at Shop No. 3 Manji Jadaoji Building, Main Street, Nadi Town.*
2. *The Defendant is a foreign company duly incorporated in India and having its principle place of business in Fiji at Suva and carrying on business as insurance underwriters.*

3. *The Defendant issued a Policy of Insurance No. 1123/10044180/000/00 dated 15th November 2012 to the Plaintiffs on the Plaintiff's stock in trade and business furniture fixtures and fittings for a sum of \$150,000.00.*
4. *There was a fire at shop no.3, Manji Jadaji Building, Main Street Nadi Town and the shop of the Plaintiff were destroyed.*
5. *On or about 13th day of February, 2013 the Plaintiffs made a claim with the Defendant under the said Fire Insurance Policy for stock, furniture and fittings in the sum of \$150,000.*
6. *The Defendant rejected the claim of the Plaintiffs.*

Issues

7. *Whether the said Fire Insurance Policy was valid when the fire took place?*
8. *Whether the Plaintiff suffered loss and damages to the extent of \$150,000.00 being the costs of the stock in trade and business furniture fixtures and fittings, if not, at what amount did the Plaintiffs suffer loss and damages, if any applicable?*
9. *Whether the Defendant is liable under the said Policy to compensate the Plaintiffs for stock, furniture and fittings in the sum of \$150,000?*
10. *Whether the Defendant breached its Fire Insurance Contract when it rejected the claim of the Plaintiffs?*
11. *Whether the Defendant complied with the Fire Insurance contract by carrying out its proper investigation and did not breached the same?*
12. *Whether the Plaintiffs suffered loss of income and damages due to the failure of the Defendant to indemnify the Plaintiffs under the said Fire Insurance Policy?*
13. *Whether the Defendant at all time has acted swiftly and has complied with the provisions of Fair Trading Decree?*
14. *Whether the Defendant's conduct was deceptive and breached the terms of Fair Trading Decree?*
15. *Issues as per paragraph 15 of the Statement of Defence?*
16. *Issues as per paragraph 16 of the Statement of Defence?*

(C) ORAL EVIDENCE

Plaintiffs' case —→ (Ms) Sudesh Singh (the second plaintiff)

Defendant's case —→ (Mr) Ashneel N.Lal (Insurance Officer)

(D) Documentary Evidence

Plaintiffs' exhibits

DATE	EXHIBIT NO:	DESCRIPTION OF EXHIBITS
4/3/19	Plaintiff Exhibit 1.	Certificate of Registration of Plaintiff Company dated 1/7/2011.
"	Plaintiff Exhibit 2.	Fire Insurance Policy
"	Plaintiff Exhibit 3	Fire Claim Form dated 13/2/13
"	PEX 4.	Police Report dated 21/6/13.
"	PEX 5.	Letter from defendant company to plaintiff company dated 17/12/15.
"	PEX 6.	Letter from plaintiff company to defendant company dated 8/1/16.
"	PEX 7.	Letter from defendant company to plaintiff company dated 6/9/16.

Defendant's Exhibits

DATE	EXHIBIT NO:	DESCRIPTION OF EXHIBITS
4/3/19	DEX 1.	Application for Registration by a firm.
"	DEX 2.	Company search of Khoobh Surat Dulhan Ltd t/a HIZZ & HERZ.
"	DEX 3.	National Fire Authority report dated 13/1/13.
"	DEX 4.	Forensic Consulting Service PTY Ltd investigation report dated 4/2/13.
"	DEX 5.	McLarens Report dated 18/2/13.
"	DEX 6.	Supplementary Report from McLarens dated 8/12/15.
"	DEX 7.	Letter dated 17/12/15 from Defendant to the Plaintiffs.
"	DEX 8.	Tax Invoice – Waterfront Hotel Tanoa dated 4/3/19 Tax invoice – Travel Center (PTE) Ltd Air Ticket dated 1/3/19 Email dated 27/2/19 from John to Nilesh.

(E) THE PRELIMINARY OBJECTION

- (1) During the trial, Counsel for the defendant raised a preliminary objection to the claim. Counsel for the defendant submitted that the plaintiffs are not the rightful party to initiate the proceedings against the defendant insurance company.
- (2) According to the 'Fire insurance Policy' (PEX-2), the insured is 'Hizz and Herz' and not 'Rajend Singh and Sudesh Singh'.
- (3) The 2nd named plaintiff during cross-examination at the trial confirmed the same. The transcript of 2nd named plaintiff's cross-examination contains this; (page 21 and 22 of the transcript)

Q: *Mam I would like you to have a look at DE 2, you don't have a. Who owns His and Hers. Is it limit.. I'm sorry let me rephrase this one. Isn't it correct that a limited liability company is trading as His and Hers?*

A: *Yes my Lord.*

Q: *And isn't that limited liability company called Kushboo Surat Dullam Limited?*

A: *No my lord.*

Q: *What's it called?*

A: *Khoob Surat Dulhan Limited.*

Q: *Thank you. So the plaintiff is not Rajend Singh and Sudesh Singh trading as His and Hers isn't that correct?*

A: *The plaintiff is His and Hers.*

Q: *So it's not Rajend Singh and Sudesh Singh trading as His and Hers you have given before isn't that correct?*

Court: *Is that correct or wrong?*

A: *That's correct.*

- (4) Counsel for the plaintiffs has very clearly avoided in responding to the most decisive preliminary point raised by the defendant, which in my view is indicative of the implausibility of the plaintiffs claim against the defendant.
- (5) According to the 'Certificate of Registration' (DEX – 1) the business name of the insured is 'HIZZ & HERZ' and the corporate name is 'Khoob Surat Dulham Limited.' It is my considered view that the plaintiff should have been 'Khoob Surat Dulham

Limited' trading as 'HIZZ & HERZ' and not 'Rajend Singh and Sudesh Singh' trading as 'HIZZ & HERZ'.

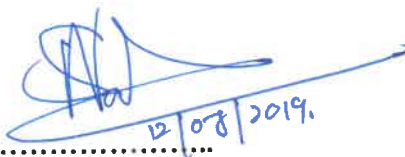
- (6) The action was instituted by a wrong party and this is a clear case of abuse of process and also an attempt to use courts machinery improperly.

(F) ORDERS

1. Preliminary objection upheld.
2. Writ of Summons and the Statement of Claim is struck out.
3. The defendant is entitled to costs which if not agreed are to be taxed on the standard basis.



At Lautoka,
Friday, 12th July, 2019


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12/07/2019.
Jude Nanayakkara
Judge