IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 90 of 2015

BETWEEN: **SUNFLAME INVESTMENTS LIMITED** a limited liability company having its registered office at 52 Narara Parade, Lautoka.

Plaintiff

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

Defendant

AND: **AON (FIJI) LIMITED,** a limited liability company having its registered office at Level 7, FNPF Place, Victoria Parade, P O Box 16960, Suva.

Third Party

Before : Master U.L. Mohamed Azhar

Counsels: No appearance for the Plaintiff
Mr. F.I. Haniff with Ms. S. R. Lovegrove for the Defendant
Mr. Adish K. Narayan for the Third Party

Date of Ruling: 03rd February 2020

RULING

(Fire Insurance, Average Clause, Duty of Insurer under section 27 of Insurance Law Reform Act 1996, Duty of Intermediary under section 6 of Insurance Act 1998, Reasonable cause of action, Striking out and Indemnity cost)

01. This is the second summons filed by AON (Fiji) Limited (hereinafter called and referred to as **Third Party**) under Order 18 rule 18 (1) (a), (b) and (d) of the High Court's Rules and inherent jurisdiction of this court, seeking an order striking out and dismissing the defendant's action against the Third Party, mainly on the basis that there is no reasonable cause of action against the Third Party. A similar summons was previously filed by the Third Party; however, it was withdrawn with the consent of both the plaintiff and the

defendant. It is essential to briefly note the factual background of this matter before coming to the instant summons filed by the Third Party.

02. The plaintiff company sued the defendant company on two separate causes of action arose out of two fire insurance policies underwritten by the defendant company. The first cause of action is that, the plaintiff company obtained fire insurance policy with reinstatement/replacement cover from the defendant company through the Third Party, which is in business of providing insurance brokerage advice to its clients both globally and locally. The Policy of Insurance was issued in the standard wording of the Third Party and covered the plaintiff's building against the loss by fire. The defendant company, by the said Policy, agreed to indemnify the plaintiff for reinstatement/replacement to a maximum of $ 460,000 VAT inclusive basis. The Policy had additional cover for loss of rentals for 12 months from 07.04.2012 to 07.04.2013. However, the liability of the defendant company was subjected to the standard average clause contained in the said policy. The plaintiff's building was destroyed by fire on 06.01.2013 whilst the policy was current, causing damages in sum $ 409,000 (VIP). The plaintiff lodged the claim for the said loss and damages and for loss of rental income for 12 months from 06.01.2013 to 06.01.2014 in a sum of $ 110,400 (VIP). Despite several requests by the both the plaintiff and the Third Party, the defendant company failed and or neglected to indemnify the plaintiff company as per the policy. The plaintiff further claimed that, the defendant offered a sum of $ 267,374.14 calculated based on the average clause. However, the plaintiff refused to accept that amount and also claimed that, the said amount neither included the loss for rental from 06.07.2013 to 06.01.2014, nor the interest for late payment of the claim.

03. The second cause of action arose out of the other fire insurance policy issued by the defendant pursuant to the slip placed by the Third Party on 16.07.2014 on behalf of the plaintiff. It covered the plaintiff's building for reinstatement/replacement to a maximum sum of $ 600,000 plus VAT and loss of rental for 12 months. At all material times, the said building was leased to Shop N Serve Super Market at a monthly rental of $ 17,250 VIP. The fire occurred on 10.06.2014 whilst the policy was current, and the plaintiff suffered loss and damage to the extent of $ 393,300 VIP, being the cost of reinstating/repairing the damaged building. The plaintiff also suffered the loss of rental for four months amounting to $ 69,000 VIP. Despite several requests made by the plaintiff and Third Party, the defendant failed to indemnify the plaintiff. Therefore, the plaintiff sought following reliefs for both causes of action:

First Cause of Action

A. *Judgment for $409,000.00 VIP or for so much thereof as is found due and payable by the Defendant in respect of the building claim; and*

B. *Judgment for $110,400 VIP for loss of rental from 6 January 2013 to 6 January 2014.*

C. *Damages resulting from breach of the insurance contract [to be quantified at the trial].*

D. *Interest on the judgment sum at 10% compounded daily pursuant to s.34 Insurance Law Reform Act 1996 calculated from 6 April 2013 to the date of payment.*

E. *Indemnity costs of this proceeding.*

Second Cause of Action

F. *Judgment for $393,300.00 VIP or for so much thereof as is found due and payable by the Defendant in respect of the building claim; and*

G. *Judgment for $69,000 VIP for loss of rental from 10 June 2014 to 10 October 2014.*

H. *Damages resulting from breach of the insurance contract [to be quantified at the trial].*

I. *Interest on the judgment sum at 10% compounded daily pursuant to s.34 Insurance Law Reform Act 1996 calculated from 10 September 2014 to the date of payment.*

J. *Indemnity costs of this proceeding.*

04. Even though the plaintiff company pleaded in its amended statement of claim that, it refused to accept the amount offered by the defendant company calculated based on the average clause in respect of the of the first cause of action, it later filed the summons for summary judgement for the said amount together with the interest at the rate of 10% per annum compounded pursuant to section 34 of the Insurance Law Reform Act 1996.

05. The defendant, having filled acknowledgement of service of writ of summons, issued the Third Party Notice on the Third Party and thereafter filed its statement of defence. In reply to the first cause of action, the defendant company stated that, the average clause in the policy applied and therefore its liability was limited to the amount it offered to the plaintiff. Thus, the defendant company consented for the summons filed by the plaintiff company for summary judgment in relation to the said amount. In reply to the second cause of action, the defendant company stated that, the investigation was going on, and it was hampered due to plaintiff's failure to co-operate with the investigation carried out by the defendant's loss adjuster. Therefore, the defendant prayed to strike out the statement

of claim with the cost on solicitor/client indemnity basis. However, the plaintiff maintained the first cause of action as if the average clause did not apply.

06. The Insurance Policy, which was admittedly issued in the standard wordings of the Third Party, contains the Average Clause which limits the liability of the defendant company. The section 27 of the Insurance Law Reform Act 1996 imposes a duty on an insurer to inform the insured in writing of the average clause, if the later was to rely on it, in order to limit its liability. The said section reads;

> *27.-(1) An insurer may not rely on an average provision included in a contract of general insurance unless, before the contract was entered into, the insurer clearly informed the insured in writing of the nature and effect of the provision.*

07. The plaintiff cited the said section in the statement of claim and specifically pleaded that, the defendant did not inform the plaintiff or give the plaintiff or its insurance broker – the Third Party – a letter or note in writing explaining the nature and effect of the average clause as required by the said section 27. Thus the plaintiff company claims that, the defendant company cannot rely on the Average Clause. Conversely, the defendant denied that claim and stated that, both the plaintiff company and the Third Party were at the relationship of agency for a commission and the Third Party knew or ought to have known that, the nature and effect of the Average Clause should have been explained to the plaintiff by the Third Party itself, because the placing slip was prepared by the Third Party and the wording of the Average Clause was in the standard wording of the Third Party. This defence prompted the defendant company to issue the Third Party Notice and statement of claim against the Third Party – the insurance broker, claiming that the Third Party was responsible to explain the policy conditions to the plaintiff. The Third Party filed the statement of defence, which was the replied by the defendant, and the pleadings were closed among the parties. Thereafter, the parties filed their respective affidavits verifying lists documents and the matter was adjourned for discoveries, when Third Party filed the instant summons for striking out the plaintiff's claim against it.

08. At hearing of the summons, the counsels for both the defendant company and the Third Party made oral submission and tendered their written submission. Thereafter, the reply submissions too were filed. The plaintiff was absent and unrepresented at the hearing, as the proceedings were between the defendant and the Third Party.

09. The counsel for the Third Party argued that, the statement of claim of the defendant does not disclose a reasonable cause of action against his client and based his argument on four grounds. Firstly, the claim fails to plead a duty owned by the Third Party to the defendant company. It was the argument of the counsel that, the pleadings does not disclose any allegation of breach of contract or duty of care or any other duty on the

Third Party towards the defendant company. Secondly, no such duty exists as the section 27 of the Insurance Reform Act 1996 imposes the burden on the insurer - the defendant company in this case - to explain the Average Clause in writing, if the it was to rely on it. The counsel further submitted that, the statute does not impose an obligation on the broker to discharge the statutory duty of an insurer to explain the nature of the average clause. Thirdly, even there is a duty or such duty has been pleaded, such duty does not exist in the light of paragraph 18 of the statement of claim filed by the defendant against the Third Party, because the defendant in that paragraph specifically pleaded that, the Third Party did advise the plaintiff of the nature and effect of the Average Clause. Finally, in any event, the Average Clause shall not apply in this case, because it was a total loss and not a partial loss for the Average Clause to apply. In support of this ground, the counsel for the Third Party relied on the word "destroyed" used by the plaintiff in its statement of claim, and argued that, the said word denotes the total loss and not partial loss. Therefore, the counsel submitted to strike out the statement of claim of the defendant and moved for indemnity cost.

10. The counsel for the defendant on the other hand argued to dismiss the summons filed by the Third Party on several grounds and moved for the indemnity cost too. Firstly, the counsel submitted that, the Third Party is an intermediary in terms of the Insurance Act 1998 and provides brokerage services in Fiji and globally. The Third Party placed the insurance using its own Policy wording and was the channel of communication or intermediary between the plaintiff and the defendant. Therefore, the defendant company in paragraphs 17 and 18 of the statement of claim against the Third Party pleaded that, the Third Party was responsible to explain the nature and effect of the average clause. The counsel further submitted that, the Third Party in response to said pleadings admitted its obligations to the plaintiff both under the common law and statute. The counsel cited several paragraphs of statement of defence filed by the Third Party which clearly admit the obligations of the Third Party towards the plaintiff. Secondly, the counsel argued that, the section 27 of the Insurance Law Reform Act 1996 is relevant only when the relationship is between the insurer and insured and not applicable when the intermediary – the broker or an agent – is involved in any insurance contract. Thirdly, the counsel cited the section 6 of the Insurance Act 1998 which requires the intermediary to give a reasonable explanation to an insured of the contents of a policy and particularly the extent of cover and exclusions contained in the Policy.

11. It is now evident that, the dispute between the defendant and the Third Party is on the application of section 27 of the Insurance Law Reform Act 1996 and section 6 of the Insurance Act 1998 in relation to the average clause in the fire insurance policy underwritten by the defendant upon the Third Party placing the slip on behalf of the plaintiff. Since both parties rely on one provision of the above mentioned two legislations for their argument, it has become necessary to discuss the average clause, its application, the duties under section 27 of the Insurance Law Reform Act 1996 and section 6 of the

Insurance Act 1998 in general before examining the pleadings in this case to decide whether a reasonable cause of action is pleaded by the defendant company against the Third Party or not.

12. The fire insurance policy is a contract of indemnity and the insured cannot claim more than the actual amount of loss caused by fire. However, there may be situations where the assets are insured for less than their actual value, which is called 'under-insurance'. The insurers generally rely on the principle of average in case of under-insurance apart from other causes of action such as avoiding the policy or the liability on the basis of non-disclosure and *uberrimae fidei*. The principle of average is, however, not applicable in case of total loss. For the purpose of resolving the dispute over under-insurance and limitation of liability, the fire insurance policies, as other property insurance policies do, contain the average clause. The average clause requires that, where the assets are insured for less than their full value, the insured is required to bear a proportion of any loss. The insurer will only bear ratable proportion of the loss and the insured has to be his own insurer for the difference between the actual value of subject property and the amount for which it is insured. Accordingly, the insurers adopt the following general formula to calculate the amount payable in such a situation:

The amount payable = actual loss x insured amount ÷ actual value of the assets.

13. The contract of insurance, in general, defers from the other contracts, by its specialty that is *Uberrimae Fidei* and it is known as contract of *uberrimae fidei* or contact of utmost good faith (per: Scrutton LJ in **Hoff Trading Co. v. Union Insurance Society of Canton Ltd** (1923) 45 TLR 466 at page 467 and in **Greenhill v. Federal Insurance Company Ltd** (1927) 1 KB 65 at page 76). The most important manifestation of this doctrine is to disclose all material facts and refrain from making any false representation and keeping back any information in relation to the risk that has to be borne by the insurer. This is a common law doctrine introduced by Lord Mansfield in the celebrated case of **Carter v. Boehm** (1766) 3 Burr 1905. The reciprocal duty imposed by this doctrine forbids either party by concealing what he or it privately knows, to draw the other into bargain. The purpose of this duty is to safeguard the interests of both the insured and the insurer. The simple application of this duty, on one hand, is that the insured is under duty to disclose all material facts which might influence the decision of the insurers in evaluating the risk they cover. On the other hand, the insurer is under duty to explain the cover, its nature and any limitation attached to a particular insurance policy to the insured. So that both are in on an equal footing when entering into the contract of insurance. This common law duty was later codified into the statutes in many jurisdictions.

14. There are two legislations in Fiji namely, the Insurance Law Reform Act No. 09 of 1996 and Insurance Act No. 36 of 1998 to govern all insurance contracts and insurance

industry in general. The first one was passed to regulate contracts of insurance in order to eliminate real or perceived imbalance between interests of insurers and insured and other members of public in line with the contemporary developments that took place in other jurisdiction to redress the undesirable practices in insurance market in relation to insurance contracts and terms and conditions of the insurance policies. The second one (Insurance Act No. 36 of 1998) repealed the Insurance Act 1976, and the new provisions have been added to give the legislation more flexibility in the conduct of insurance industry, supervision and to intensify the level of protection afforded to the insurance customers. Both sections (section 27 of the Insurance Law Reform Act 1996 and section 6 of the Insurance Act 1998 on which both parties rely for their respective contention) are the refection of the common law duty of disclosure. The reason being that the section 27 falls under Division IV of that Act which deals the remedies for non-disclosure. In the meantime, the section 6 of the other Act comes under the sub-title *"Duty of intermediary to explain proposal and policies"*. So when interpreting both these sections, the court must be mindful of this common law duty of disclosure, which was later incorporated to the statutes.

15. For the convenience and easy reference, the section 27 of the Insurance Law Reform Act 1996, on which the both the plaintiff and the Third Party rely for their argument that the defendant cannot rely on the average clause, is repeated below and it reads:

> *27.-(1) An insurer may not rely on an average provision included in a contract of general insurance unless, before the contract was entered into, the insurer clearly informed the insured in writing of the nature and effect of the provision.*

16. The unambiguous language of the above section provides that, the insurer should have clearly informed the insured in writing of the nature and effect of the average clause contained in a policy, if it relies on the same clause to pay a ratable amount of claim. Since this duty derives from the common law doctrine of *Uberrimae Fidei* or utmost good faith, the insurer is deemed to have discharged this duty only if clear information in writing was given to the insured before the contract was entered into. An insurer, who failed to give such information to the insured before entering into an insurance contract, may not rely on the average clause to limit its liability. However, if an insurer decides not to rely on the average clause even after information before the contract was entered into, this section shall not prevent such decision, as it is the discretion of an insurer to fully indemnify its insured or to limit its liability.

17. Conversely, the section 6 of the Insurance Act 1998, on which the defendant relies for its argument that, the Third Party failed to perform the mandatory duty to explain the particular average clause, reads that:

Duty of intermediary to explain proposal and policies

*6.(1) **Notwithstanding any other written or other law, an intermediary must-***

*(a) provide a **reasonable explanation to a person proposing to enter into or renew a contract of insurance, of the contents of all documents** required to be signed by the person;*

*(b) **communicate to the insurer all information** of which the intermediary was aware at any time before or during any negotiations for a contract of insurance or for renewal of insurance which is likely to affect the contract; and*

*(c) provide a reasonable explanation to an insured whose policy was placed or procured by or through the intermediary of the contents of that policy and **particularly the extent of cover and exclusions contained in the policy**.*

*(2) **An intermediary who contravenes subsection (1) is liable to the insurer and to the person for whom the intermediary is acting for any loss resulting from the contravention**.*

*(3) **The obligations imposed by this section are in addition to and do not lessen the liability of an intermediary under the provisions of any other law, whether written or unwritten**.* (Emphasis added).

18. The mandatory duty is imposed on the intermediary, which means agent and broker as per the definition in section 2 of that Act. The phrase "***Notwithstanding any other written or other law***" at the beginning of the above section denotes it is an overriding duty which supersedes any duty under any other law in this regard. It is an additional duty and does not lessen the liability of an intermediary under provisions of any other written or unwritten law as per subsection (3) of section 6 of the Insurance Act 1998. Furthermore, the duty of the intermediary under this section to explain the proposals and policies is not a 'one time duty', which can be discharged at the first time the policy is obtained, but it is a continuing duty to be discharged at each and every time the policy is renewed. This is meant by the phrase "***a person proposing to enter into or renew a contract of insurance***" in subsection (a). More specifically, the sub section (c) requires an intermediary to provide reasonable explanation on the extent of cover and exclusions contained in the policy. Generally, the agent is the representative of insurer and the broker is the representative of insured unless the latter is acting under binder. However, as the intermediary both the agent and broker have duties towards the insurer and insured as well, and they are liable to both the insured and insurer, if they failed to discharge the

above duty. This duty on the intermediary is supplementary and superseding to other duties under any written or unwritten law.

19. Accordingly, the section 27 of the Insurance Law Reform Act 1996 imposes a duty on the insurer to inform the insured in writing of the average clause, if the former intends to rely on it. On the other hand, the section 6 of the Insurance Act imposes a comprehensive and an overriding duty on the intermediary (both agent and broker) towards the insurer and insured, and further holds the intermediary liable for any loss caused to both the insurer and the insured for failing to discharge such duty. As stated earlier, these two sections are the reflection of common law duty of utmost good faith or *Uberrimae Fidei*, which requires full disclosure, and the purpose of these sections is to protect the insured and the insurer from any claim which might arise out of any alleged unexplained clause or condition of a particular policy. The question is as to when these two sections to be applied?

20. The insurance contracts are generally entered into by the insured and insurers directly, where the insured meets the underwriters personally and obtains the policy. In this instance, the insured fills and signs the proposal form and all the communications in relation to the premium, types of cover and the limitation/exclusion clauses will directly be communicated and discussed by both the insured and the insurer/underwriters before the policy is issued. The insurer will also inform the insured of the claim procedure to be followed in case the insured peril occurs. The section 27 of the Insurance Law Reform Act 1996 applies in this situation and the insurer is obliged to explain the nature and effect of the exclusion clause to the insured in writing.

21. However, the insurance contracts by the corporate customers are frequently entered into, through the intermediaries, i.e. either through the insurance agents or insurance brokers. The insurance agent is the representative of an insurer, carries on the business of channeling, soliciting, or procuring insurance business for the insurer, for or in expectation of payment by way of commission, allowance, return or other remuneration. The agent is licensed under section 43 (1) of the Insurance Act to carry on such business. The insurance broker is the representative of an insured, carries on the business of arranging contracts of insurance for or in expectation of payment by way of brokerage, commission, fee, allowance, return or otherwise and is licensed under section 43(1) of the Insurance Act to carry on such business. However, section 9 of the Insurance Act recognizes the broker as an agent under binder. Likewise, in some cases, the brokers held to be the agents of the insurer (see: **Stockton v. Mason** [1978] 2 Lloyd's Rep 430 and **Woolcott v. Excess Insurance Co. Ltd** [1979] 1 Lloyd's Rep 231).

22. In any event, when an insurance contract is entered into, through an intermediary, the insurer does not directly communicate with the insured and the insured too does not get an opportunity to face the underwriters of the insurer. Either the agent enters into the

contract on behalf of the insurer or the broker places the slip with the insurer, with its standard wording as it had happened in this case, on behalf of the insured. Considering these circumstances, the law imposes an overriding duty on the intermediary (the agent and the broker) to give reasonable explanation of the proposal and policy, in particular on the extent of cover and exclusion clause. The drafters of the legislation in their wisdom realized that, the both the insured and the insurer are not directly communicating when a policy is issued through an intermediary. They also realized that, the duty casted on the insurer under section 27 of Insurance Law Reform Act 1996 will not be useful as the insurer and the insured are not directly communicating when the intermediary acts between them. They further realized, in their wisdom that, the non-disclosure by the intermediary which might affect either the insured or insurer at the time of claim.

23. Thus, the Insurance Act 1998, which was passed subsequent to the previous Act (Insurance Law Reform Act 1996) to provide for the regulation of the business of insurance, for the licensing and supervision of insurers and insurance intermediaries, incorporated a mandatory and an overriding duty on the intermediary towards the insurer and insured through section 6 of that Act (Insurance Act 1998). This section 6 in the subsequent legislation applies to all intermediaries notwithstanding the provisions of any other written and unwritten law as it is clearly provided at the beginning of that section, and also holds the intermediary liable to both insurer and insured for contravention of such mandatory duty. This is the rational of section 6 of Insurance Act 1998. Though the ultimate purpose of both section 27 Insurance Law Reform Act 1996 and section 6 of the Insurance Act 1998 is to give reasonable information of the exclusion and limitation clauses of the policy to the insured, each of the sections applies in different contexts. The section 27 of the Insurance Law Reform Act 1996 applies to the policies directly issued by the insurers to the insured, and the section 6 applies to the policies underwritten through the intermediaries.

24. Admittedly, the fire insurance policy relevant to the first cause of action in this case was underwritten pursuant to the Third Party's placing slip dated 11.05.2012. The Third Party had acted as the insurance broker (intermediary) and the policy was issued in the standard policy wording of the Third Party. It follows that, the Third Party, which acted as the intermediary, was statutorily bound under section 6 of the Insurance Act 1998 to provide a reasonable explanation to the plaintiff of the contents of that fire insurance policy and particularly the extent of cover and exclusions contained in that policy. Clearly it is the section 6 of the Insurance Act 1998 that applies in this case and certainly not the section 27 of the Insurance Reform Act 1996.

25. Therefore, the statement of claim filed by the defendant company against the Third Party must be looked at with the above duty imposed by the section 6 of the Insurance Act 1998 on the Third Party (intermediary) to decide whether a reasonable cause of action is disclosed or not against the Third Party. Citing several authorities, Halsbury's Laws of

England (4th Edition) in volume 37 at para 18 and page 24, defines the reasonable cause of action as follows:

> *"A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case are considered" Drummond-Jackson v British Medical Association [1970] 1 ALL ER 1094 at 1101, [1970] 1 WLR 688 at 696, CA, per Lord Pearson. See also Republic of Peru v Peruvian Guano Co. (1887) 36 ChD 489 at 495 per Chitty J; Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark Ltd [1899] 1 QB 86 at 90,91, CA, per Lindley MR; Hanratty v Lord Butler of Saffron Walden (1971) 115 Sol Jo 386, CA.*

26. Furthermore, the court can come to a conclusion of either existence or absence of a reasonable cause of action merely on the pleadings itself, without any extraneous evidence. His Lordship the former Chief Justice A.H.C.T. Gates (as His Lordship then was) in **Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC208.1998L (23 February 2005) held that:

> *"To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18(2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company (1887) 36 Ch.D 489 at p.498".*

27. The basis of the third party notice by the defendant against the Third Party is that the latter failed to discharge the duty of explaining the nature of the average clause in the said fire insurance policy as it is reflected in the third party notice filed by the defendant company on 09.07.2015. However, the Third Party Notice is not pleadings. The statement of claim, filed by the defendant company against the Third Party on 07.03.2016, alleges in paragraph 12 that, Third Party, being the broker of the plaintiff, was responsible for fully advising its client as to the nature and effect of the provisions of the policy. Further in paragraph 17 the defendant alleges that the Third Party knew and ought to have known the nature and effect of the average clause and should have explained to the plaintiff. Both paragraphs are as follows:

> *12. that all material times base on the insurance brokerage advise the Third Party was providing to its plaintiff client at a broker commission, the Third Party was responsible for fully advising its plaintiff client as to the nature and effect (pros and cons, benefits etc) of any provision in the insurance policy*

17. that all material times the Third Party knew or ought to have known that the "nature and effect of the average clause" should have been explained by the Third Party to the plaintiff.

28. It is clear from the above averments that, defendant - company alleges that, the Third Party was responsible to explain the extent of the cover and exclusion contained in the policy to the plaintiff, and therefore claims full indemnity from the Third Party for any claim whatsoever by the plaintiff against the defendant company. Apart from that, the Third Party too, whilst responding to the claim of the defendant, in several paragraphs of its statement of defence, admitted that it was required to fulfill its obligations to the plaintiff as per its terms of engagement and the usual common law and statutory obligations. The paragraphs 5 and 10 of the statement of defence of the Third Party are as follows:

05. As to paragraph 12 of the defendant's claim the Third Party
(i) admits that it was an insurance broker and entitled to fees in the normal course of its business

(ii) avers that its obligation to plaintiff was as per the terms of its engagement and the usual common law and statutory duties and obligations for an intermediary to the plaintiff;

10. As to paragraph 18 and 18 of the defendant's claim the Third Party
(i) admits that it was required to fulfill its obligations to the plaintiff as per the terms of engagement and usual common law and statutory obligations which it performed;

29. The pleadings in civil suits serve several purposes; (a) identifying the issues between the parties, (b) giving the opponent an adequate notice of the case for him to prepare his defence and meet the trial, (c) informing the court the real issues between parties and (d) forming the basis for an estoppel in any future litigation between the same parties on the same issues are some of the important purposes. In this case, the allegation is that, the Third Party was responsible for explaining the extent of the cover and it should indemnify the defendant for any claim arises out of non-explanation. The Third Party, in reply to the claim of the defendant, stated in paragraph 10 its statement of defence as shown above, that, it performed its duties under statutes and common law. This shows that, the issue between the defendant and the Third Party has been identified; Third Party was given adequate notice of the allegation and it defended stating that, it had fulfilled all the obligations under both statute and common law.

30. Accordingly, examination of all the pleadings by the parties to this action reveals that, the claim of the plaintiff against the defendant is mainly based on the duty of defendant

under the section 27 of the Insurance Law Reform Act 1996. The plaintiff claimed that, the defendant company cannot rely on the average clause in settling the claim for the first cause of action, because it failed its duty to inform the plaintiff in writing of the extent of the cover and especially the nature of the average clause. On the other hand the defendant whilst denying its liability under the said section to explain the policy to the plaintiff and stated that, the policy was issued through the Third Party – intermediary and it was the responsibility of the Third Party to explain the policy in terms of section 6 of the Insurance Act 1998. However, the defendant did not specifically plead the said section 6 as the plaintiff did plead the section 27 of the Insurance Law Reform Act 1996. Further, the paragraph 18 of the statement of claim of the defendant states that, "at all material times, the Third Party did advise the plaintiff of the nature and effect of the average clause". The counsel for the Third Party too based one ground of submission on this paragraph. Conversely, the counsel for the defendant acknowledged it as an inconsistency in the pleadings and submitted that, this can be amended even at the appeal stage. The counsel further submitted that, there is no precedent to strike out the pleadings altogether because of an inconsistency in pleadings. The question therefore is whether entire claim of the defendant against the Third Party should be struck out for the reasons of not pleading the section 6 of the Insurance Act 1998 and for this inconsistency, when the pleadings clearly demonstrate the actual allegation against the Third Party and legal question of applicability of section 27 of the Insurance Law Reform Act 1996 and section 6 of the Insurance Act 1998 is to be determined in this matter?

31. The law on striking out the pleadings is well settled. The Order 18 rule 18 of the High Court Rule gives the discretionary power to strike out the proceedings for the reasons mentioned therein. The said rule reads:

> *18 (1) The Court **may** at any stage of the proceedings **order to be struck out** **or** **amend** any pleading or the indorsement of any writ in the action, or **anything in any pleading** or in the indorsement, on the ground that-*
>
> *(a) It discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) It is scandalous, frivolous or vexatious; or*
>
> *(c) It may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) It is otherwise an abuse of the process of the court;*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

(2) *No evidence shall be admissible on an application under paragraph (1)(a).*

(3) *This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading* (emphasis added)

32. The notable feature of this rule is firstly, the power given under this rule is *permissive* which is indicated by the word *"may"* used at the beginning of this rule as opposed to *mandatory*. It is a *"may do"* provision contrary to *"must do"* provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not ***necessarily*** be struck out, as the court can, still, order for amendment. In **Carl Zeiss Stiftung v Rayner & Keeler Ltd** (No 3) [1970] Ch. 506, it was held that, the power given to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea.

33. Lord Pearson in **Drummond-Jackson v British Medical Association** [1970] 1 ALL ER 1094 held at page 1101 that;

> *Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. The authorities are collected in The Supreme Court Practice 1970 Vol 1, p 284, para 18/19/3, under the heading 'Exercise of Powers under this Rule' in the notes under Ord 18, r 19. One which might be added is Nagle v Feilden [1966] 1 All ER 689 at 695, 697; [1966] 2 QB 633 at 648, 651. Reference has been made to four Recent cases: Rondel v Worsley [1967] 3 All ER 993, [1969] 1 AC 191, Wiseman v Borneman [1969] 3 All ER 275, [1969] 3 WLR 706, Roy v Prior [1969] 3 All ER 1153, [1969] 3 WLR 635, and Schmidt v Secretary of State for Home Affairs [1969] 1 All ER 904, [1969] 2 Ch 149 .....There was no departure from the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed, but the procedural method was unusual in that there was a relatively long and elaborate instead of a short and summary hearing.*

34. Hon. Marsack J.A. giving concurring judgment of the Court of Appeal in **Attorney General v Halka [1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972)** held that:

"Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised".

35. Accordingly, the rule provides for the permissive power to the courts to strike out the claim or proceedings for the above grounds as opposed to the mandatory power. Even though the court finds four grounds mentioned in the above rule, the court still has the discretion to allow the amendment of anything in any pleading as highlighted above in the rule. Therefore, the power to strike out on those grounds should, sparingly, be exercised and, only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised. It would always be preferable to allow the amendment instead of striking out, unless the interest of justice requires striking out.

36. Salmon LJ said in **Nagle v Feilden** [1966] 1 All ER 689 at 697:

'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable'.

37. As a result, I hold that, the issues in relation to pleading of section 6 of the Insurance Act 1998 and inconsistency as mentioned above should be amended and this court should not exercise the power to strike out the pleadings in this case. I am also of the view that, this is not an exceptional case where the interest of justice requires striking out.

38. Furthermore, the counsel for the Third Party submitted that, in any event, the average clause does not apply in this case, because it was the total loss and not the partial loss for the average clause to be applied by the defendant. Whilst explaining his reasons for this argument, the counsel submitted that, the amended statement of claim of the plaintiff states that, insured property was destroyed by fire and there is no pleading of partial loss. I am unable to agree with the inference the counsel had from the word "destroyed" for three reasons. Firstly, this court cannot come to a conclusion of either it was a partial or total loss merely on the word "destroyed" used by the plaintiff in its statement of claim. This cannot be decided based on the pleading; nor at this stage, as it is the matter for the trial judge to decide on evidence. Secondly, the plaintiff's claim, that the average clause does not apply in this case, is based on the fact that, defendant failed to inform of its nature in writing and not on the basis of total loss. Finally, the plaintiff's claim for the first cause of action is less than the sum insured as it is pleaded in the plain language.

39. The last issue is the cost sought by both parties. Interestingly, both counsels moved the court to grant indemnity cost against the other. The counsel for the Third Party moved to

strike out the claim of the defendant with indemnity cost and the counsel for the defendant moved to dismiss the summons filed by the Third Party with indemnity cost. There is large number of both foreign and local authorities, which are often cited and adopted by the courts in Fiji in relation to imposing indemnity cost in a given case. Needless to mention all of those authorities, but the principle that follows from those authorities is that, the award of indemnity costs would only be considered in exceptional cases where the conduct of a party was reprehensible to a significant degree.

40. I do not see the conduct of any party to this proceeding was reprehensible to the degree that warrants this court to consider imposing indemnity cost. The issues of pleading in line with the duty imposed by the section 6 of the Insurance Act 1998 and above mentioned inconsistency in the pleadings could have been sorted out by mutual agreement and understanding between the counsels in my view. However, the Third Party preferred this summons and defendant too presented his position. Finally this court is of the view that, the allegation in the pleadings of the defendant shows a legal question of importance, i.e. the duties of an Insurer and a Broker both under section 27 of the Insurance Law Reform Act 1996 and section 6 of the Insurance Act 1998 respectively, to be decided. Therefore, I order that, the cost for this proceeding will be in the cause.

41. As a result, I make the following orders,

a. The summons filed by the Third Party is dismissed,

b. The defendant is allowed to amend the statement of claim against the Third Party as mentioned above,

c. The amended statement of claim must be filed and served on or before 17.02.2020,

d. The Third Party to file the amended statement of defence to the amended statement of claim on or before 02.03.2020,

e. The cost will be in the cause, and

f. The matter to be mentioned on 09.03.2020.

HIGH COURT OF FIJI
LAUTOKA

U.L Mohamed Azhar
Master of the High Court

At Lautoka
03/02/2020