

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 43 OF 2015

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

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

Appearances : Mr R. Gordon for the defendant/applicant
Mr C. B. Young for the plaintiff/respondent
Date of Hearing: 27 June 2018
Date of Ruling : 08 August 2018

R U L I N G

[on specific discovery]

Introduction

[01] This is an application for specific discovery.

[02] By its summons dated 31 January 2018, the defendant/applicant (*'the defendant'*) has applied for specific discovery of the following documents:-

1. *That the plaintiff within 14 days provide to the Defendant's solicitors certified true copies of the audited accounts, including the detailed profit and loss statements and detailed balance*

sheets for the years and/or financial periods and/or financial years and/or accounting years 2013, 2014, 2015 and 2016 of R Prasad Limited, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation and/or any subsidiary company of R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation where more than half the nominal value of whose equity share capital is owned by R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation either directly or through other subsidiaries and any entity over which R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation exercises management control;

2. *That alternatively the Plaintiff within 14 days produce to the Honourable Court certified true copies of the audited accounts, including the detailed profit and loss statements detailed balance sheets for the years and/or financial periods and/or financial years and/or accounting years 2013, 2014, 2015 and 2016 of R Prasad Limited, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation and/or any subsidiary company of R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation where more than half the nominal value of whose equity share capital is owned by R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation either directly or through other subsidiaries and entity over which R Prasad Limited, Kalabo Investments Limited Trading as Shop 'N' Save Supermarket, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation exercises management control and the same then be inspected by the Defendant and/or its solicitors subject to the directions of the Honourable Court;*
3. *That alternatively the Plaintiff be ordered to provide to the Defendant and/or its solicitors such documents and/or information and/or details as the Honourable Court deems and/or orders is required and/or necessary for and/or to enable the Defendant to fairly, properly, fully, adequately and reasonably assess the Plaintiff's Material Damage and Business Interruption claims;*
4. *Such further and/or other orders as may be deemed and/or ordered necessary and/or justified and/or expedient in the circumstances and/or required and and/or necessary for and/or enable the Defendant to fairly, properly, fully, adequately and reasonably assess the Plaintiff's Material Damage and Business Interruption claims;*

5. *That until the Plaintiff provides the documents, accounts, information as sought in the orders hereinabove the hearing and/or further hearing and/or continuation of the hearing of the Plaintiff's claim and/or this matter be stayed and/or adjourned and/or any hearing date set and/or allocated be vacated accordingly;*
6. *That if the Plaintiff fails to comply with any orders(s) of the Honourable Court compelling and/or requiring and/or directing the Plaintiff to provide documents, accounts, information to the Defendant and/or to the Court then the Plaintiff's claim be dismissed with costs on a solicitor and client full and complete indemnity basis.*
7. *That the costs of this application be paid by the Plaintiff.*

[03] The application is supported by an affidavit of Avinesh Rai ('Rai') sworn on 30 January 2018 and filed 31 January 2018.

[04] The application is filed under the High Court Rules 1988, as amended ('HCR'), Order 24, Rules 7, 11 (2) and 12.

[05] Plaintiff/respondent ('the plaintiff') opposes the application and they filed an affidavit of Peter John Faire.

[06] Mr Gordon of counsel appearing for the defendant objected to the affidavit of Peter John Faire and applied to the Court to expunge his affidavit on the ground that he has no authority to swear an affidavit on behalf of the plaintiff company. I uphold that objection and expunged Peter John Faire's affidavit from the record.

[07] At the hearing, both parties orally argued the matter and filed their respective written submissions. I am grateful to both counsel for their comprehensive submissions by which I was immensely assisted.

The Background

[08] The background facts that led to this application are as follows:

[09] On 11 August 2017, the parties executed a written terms of adjournment ('TOA'). The TOA, *inter alia*, provides:-

1. *The parties agree to adjourn this part heard matter to attempt agreement on the quantum of BI claim and on the balance MD claim, interest and costs.*
2. *To assist the parties to achieve agreement on the quantum of BI claim:*
 - a) *The plaintiff will provide to the Defendant within a reasonable time supporting documents for its BI claim and other documents or information requested by MDD's letter dated 30 July 2015 so far as is now reasonably possible to comply. The Defendant can use information held in respect of 2013 fire provided they give copy of what is used to plaintiff.*
 - b) *The will consider the documents provided and within a reasonable time frame from their receipt may seek such further documents of information as may be reasonably required to determine the quantum;*
 - c) *The Plaintiff will respond within a reasonable time to further request made by the Defendant under 2 (b).*
3. ...
4. *The Plaintiff's and the Defendant's loss preparer/adjuster will, acting reasonably, liaise with other and in good faith endeavour to reach agreement on quantum of BI claim.*
5. *If either party is unreasonable in their request of documents or information or is unreasonably dragging out the matter, either party will be at liberty to apply to the Court for further directions on any matters of impasse.*

....

[10] The defendant, according to them, asked the plaintiff for the supply of the documents to which this application relates in order to properly and fully assess the business interruption claim covered under the policy, which is the subject matter of this action. The request was made pursuant to the TOA.

- [11] The defendant also alleges that the plaintiff refuses to provide the documents requested despite their initial agreement to provide. As a result, the defendant applies to the Court seeking an order for the specific discovery of the documents.

The Law

- [12] The HCR, O 24, R 11 (2) & 12 provides: -

“ (2) Without prejudice to paragraph (1), but subject to Rule 13(1) the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.

12. At any stage of the proceedings in any cause or matter the Court may, subject to Rule 13(1), order any party to produce to the Court any document in his or her possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit.”

The submissions

Defendant

- [13] Counsel for the defendant that submits unless and until the requested information and documents are provided the defendant is unable to properly and fully assess the business interruption (BI) claim and make any determination if any amount is payable. The TOA (para 5) states that: either party will be at liberty to apply before the court for further directions on any matter of impasse. He refers to me *Pradeep Kumar v The National Insurance Company of Fiji* (HBC 0148D.1988L Lautoka High Court, Madraiwiwi. J).

Plaintiff

- [14] In contrast, Mr Young counsel for the plaintiff argues that only a document which relates in some way to a matter in issue is recoverable. The claim in this case is by the plaintiff (and not by any of the other insureds named in the policy) and relates only to the Tavua shop. He submits that the defendant cannot seek specific discovery of information and documents of other insureds named in the policy and that the defendant's summons should be dismissed with costs to the plaintiff.

Discussion

- [15] The court has the discretion to order any party to an action to make and serve on any other party a list of documents which are or have been in his or her possession, custody or power relating to any matter in question in the matter (see O 24, R 3 (1)). An order for specific discovery may be limited to such documents or classes of documents only, or to such only of the matters in questions in the cause or matter, as may specified in the matter (see O24, R 3 (3)).
- [16] The defendant's application has come up at the trial stage after the parties had executed Terms of Adjournment dated 11 August 2017, where the plaintiff had agreed to provide to the defendant within a reasonable time supporting documents for its BI (*business interruption*) claim and other documents or information requested by MDD's letter dated 30 July 2015, so far as is now reasonably possible to comply.
- [17] The plaintiff does not deny possession of the documents the defendant seeks discovery of.
- [18] The plaintiff's claim arises out of an insurance policy issued by the defendant. The policy in the schedule describes the insured to include:

"R. Prasad Limited, Kalabo Investments Limited, trading as Shop 'N' Save Supermarket, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking

Corporation; and any subsidiary company more than half the normal value of whose equity share capital is owned by the named insured either directly or through other subsidiaries; and any entity over which an insured exercises management control.”

- [19] According to the policy description, the insured has been given wider meaning. It includes whole of the business the plaintiff carries on in Fiji. It is clear by the term “... *and any entity over which an insured exercises management control.*”
- [20] The defendant seeks a specific discovery order in respect of the audited accounts, including the detailed profit and loss statements and detailed balance sheets for the financial years 2013, 2014, 2015 and 2016 of the insured, the plaintiff. The documents, accordingly to the defendant, are required for the purpose of fair assessment of BI claim.
- [21] The policy insures the insured against the risk of interruption to business (loss of gross profits due to reduction in turnover and increase in costs of working) due to loss and/or damage to/of physical items such as building and stock and the total sum insured is for \$16,250,000.00.
- [22] In *Pradeep Kumar v The National Insurance Company of Fiji* HBC 0148D.1998L Lautoka High Court, Madraiwiwi J the court in hearing an application by a defendant insurance company seeking discovery against an injured plaintiff of financial, accounting, tax and other information said:

“The defendant as the insurer has the right to seek such information in order to better assess the plaintiff’s claim.

The court adopts the approach taken in Mulley v Manifold (1959) 103 CLR 341.

Put simply the information sought would portray a more accurate portrayal of the plaintiff’s financial situation at the relevant time.

This is an issue that is of crucial relevance to the claim made and the defence the defendant has erected.”

[23] In *Mulley v Manifold* (1959) 103 CLR 341 the High Court of Australia said:

“Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to a train of enquiry which would, either advance a party’s own case or damage that of its adversary.”

[24] Where loss of business profit pension and income are part of the damages-claim, the discovery of the tax returns and financial statements will be appropriate. In *Jaureguy v Sen* [2010] FJHC 482, Master Anare Tuilevuka (now Judge) accepted the contention that where loss of business profit, pension and income including loss of past and future earning capacity) are part of damages-claim, the discovery of tax returns and financial statements will shed light on the plaintiff’s financial situation.

[25] The defendant seeks discovery of the financial statements of the plaintiff to determine its BI claim.

[26] A contract of insurance is based on the utmost good faith and a party to a contract of insurance should rely on a provision of the contract except in the utmost good faith (see ss.11 & 12 of the Insurance Law Reform Act 1996).

[27] I accept the defendant’s submission that the plaintiff knows and/or ought to have known that it cannot seek to avoid the average clause and as such in seeking to do so the plaintiff is not acting with utmost good faith and/or failing to act with the utmost good faith and as such cannot rely on section 27(1) of the Insurance Law Reform Act and/or the alleged non-applicability of the average clause.

[28] The plaintiff refuses to provide the documents sought to be discovered after agreeing to provide. By the TOA, the plaintiff had agreed to provide the documents to enable the defendant to assess the BI claim. The TOA is a

document entered into between the parties. Therefore, the plaintiff is obliged to honour it.

Conclusion

[29] In my judgment, the documents sought to be discovered are relevant for the proper assessment of BI claim. The specific discovery of information and documents relate to the insureds named in the policy, the plaintiff. I would, therefore, grant the order for specific discovery of the documents sought in the defendant's application, especially in prayer 1, with the summarily assessed costs of \$2,000.00.

The result

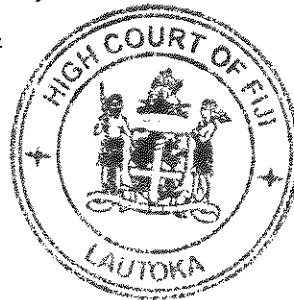
1. The defendant's application for specific discovery is allowed.
2. The plaintiff shall within 14 days provide to the Defendant's solicitors certified true copies of the audited accounts, including the detailed profit and loss statements and detailed balance sheets for the years and/or financial periods and/or financial years and/or accounting years 2013, 2014, 2015 and 2016 of R Prasad Limited, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation and/or any subsidiary company of R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation where more than half the nominal value of whose equity share capital is owned by R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels Trading as Quest Hotels and/or ANZ Banking Corporation either directly or through other subsidiaries and any entity over which R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation exercises management control;

3. The plaintiff shall pay summarily assessed the costs of \$2,000.00 to the defendant within 21 days.

M.H. Mohamed Ajmeer
8/8/18

.....
M.H. Mohamed Ajmeer

JUDGE



At Lautoka

8 August 2018

Solicitors:

For the defendant/applicant: M/s Gordon & Co, Barristers & Solicitors

For the plaintiff/respondent: M/s Young & Associates, Solicitor