

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 329 of 2010

BETWEEN : **STAR AMUSEMENTS LIMITED** a limited liability company having its registered office at 2nd Floor, Yatulau Arcade, Rodwell Road, Suva in the Republic of Fiji.

PLAINTIFF

AND : **DOMINION INSURANCE LIMITED** a limited liability company having its registered office at 231 Waimanu Road, Suva, Fiji.

DEFENDANT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : **Ms R. Naidu for the Plaintiff**
: **Ms S. Narayan for the Defendant**

DATE OF JUDGMENT : **31 October 2017**

JUDGMENT

Introduction

1. On 29 November 2010, Plaintiff filed Writ of Summons with Statement of Claim against Defendant claiming for damages in relation to fire to Plaintiff's building.

2. On 15 and 17 December 2010, Defendant filed Acknowledgement of Service and Statement of Defence respectively.
3. On 8 February 2011, Plaintiff filed Application to amend Statement of Claim and on 16 February 2011, Order in terms of Plaintiff's application was granted.
4. On 22 February 2011, Plaintiff filed Amended Statement of Claim.
5. On 11 March 2011, Defendant filed Amended Statement of Defence.
6. On 16 June 2011, Plaintiff filed Reply to Amended Statement of Defence and Summons for Directions which was called on 5 July 2011, when Order in terms of the Summons for Direction was made.
7. On 5 July 2011, parties were directed by the then Master of the High Court to convene Pre-Trial Conference ("**PTC**") and file PTC Minutes, Agreed Bundle of Documents and Copy Pleadings.
8. On 29 December 2011, Plaintiff filed Affidavit Verifying Plaintiff's List of Documents.
9. On 13 March 2012, Plaintiff filed Notice Requesting PTC.
10. On 23 May 2012, Plaintiff filed Copy Pleadings and Order 34 Summons which was returnable on 15 June 2012, when Order in terms of the Summons was granted and this matter was allocated to a Judge to fix trial date.
11. This matter was called before his Lordship Justice Balapatabendi (as he then was) on 14 August 2012, when it was adjourned to 22 and 23 April 2013 for trial.
12. For some reason or the other (not recorded on file) this matter was not called on 22 or 23 April 2013.
13. This matter was next called on 22 May 2013, before his Lordship Justice Balapatabendi (as he then was) and adjourned to 9 and 10 September 2013, for trial.

14. On 20 August 2013, Defendant filed Application to vacate trial dates which Application was called on 29 August 2013, when trial dates were vacated and matter was adjourned to 16 October 2013, to fix trial date.
15. On 16 October 2013, this matter was adjourned to 2 and 3 April 2014, for trial in this Court.
16. Trial completed on 3 April 2014, when parties were directed to file Submission and this matter was adjourned for judgment on notice.

Background Facts

17. The Plaintiff is a limited liability company having its registered office at 2nd floor, Yatulau Arcade, Rodwell Road, Suva in the Republic of Fiji.
18. The Plaintiff is the registered proprietor of Certificate of Title No. 22218 being Lot 9 on Deposited Plan No. 1433 having an area of 33 perches and situated at 4 Luke Street, Nabua, Suva in the Republic of Fiji ("**the property**") upon which is constructed a double storey building.
19. The Defendant is and was at all material times a company duly incorporated in Fiji and having its registered office at 231 Waimanu Road, Suva and carrying on the business in Fiji as an Insurance Underwriter.
20. The Defendant at all material times was the Insurer of the Plaintiff's building on the property under a Fire and Perils Policy No. 224930 - 243692 ["the Policy"] inter alia, from Fire and agreed to insure and indemnify the Plaintiff against such loss.
21. The Plaintiff on 21 December 2009, lodged a written claim for loss and damage in respect of the building.
22. The property consisted of double storey concrete building ("**Concrete Building**") in front and steel frame structure at the rear ("**Steel structure**").

23. On 18 December 2009, fire destroyed steel structure and caused certain amount of damage to concrete building.
24. Defendant denied Plaintiff's claim for loss to steel structure on the ground that it was not insured.
25. Plaintiff refused to accept the amount assessed by Defendant for concrete building on the ground that it was too less.

Documentary Evidence

26. Following documents were tendered as Exhibits:-

<u>Exhibit No.</u>	<u>Document</u>
P1	Photocopy of Certificate of Title No. 22218
P2	Photocopy of Fire Insurance Proposal Form of Dominion Insurance Limited
P3	Photocopy of Engineers Certificate
P4	Photocopy of Commercial Fire Policy with Schedule
P5	Photocopy of Commercial Loss Notice dated 21 December 2009
P6	Photocopy of letter dated 23 December 2009, from Chige Construction Company Limited to Plaintiff
P7	Photocopy of letter dated 26 April 2010, from Messrs. Sherani & Co. to Defendant.
P8	Photocopy of letter dated 30 April 2010, from Defendant to Messrs. Sherani & Co.
P9	Photocopy of letter dated 14 July 2010, from Messrs. Sherani & Co. to Defendant.
P10	Photocopy of letter dated 20 August 2010, from Messrs. Sherani & Co. to Defendant.

- P5 Five photographs of Plaintiff's building
- D1 Photographs
- D2 Letter dated 27 January 2010, from McMClarens Young International to Defendant.
- D3 Letter dated 28 June 2010, from McLarens Young International to Defendant.
- D4 Letter (Quote) dated 8 July 2010, from Sam Builders & Furniture Makers to Defendant
- D5 Letter (Quote) dated 22 December 2009 from Fortech Construction Limited to Plaintiff.

Plaintiff's Case

27. Plaintiff called Dong Hua Joe also known as Tony of 18 Salesi Road, Namadi Heights, Suva as its only witness (hereinafter referred to as **"PW"**).
28. PW during examination in chief gave evidence that:-
- (i) He is director of Plaintiff Company which is the owner of property situated at 4 Luke Street Nabua, comprised in Certificate of Title No. 22218 (Exhibit P1) and this claim has been brought regarding Insurance Policy;
 - (ii) Since he is not able to read and write English, Defendant's Agent, Rohit Chand brought all insurance documents and filled it for him to sign and Rohit Chand did not ask any question except asking for engineers certificate;
 - (iii) He gave engineers certificate dated 4 December 2003 to Rohit Chand at the time of Insurance Proposal;
 - (iv) On 4 December 2003, Plaintiff's insurance was with New India Assurance Co. Ltd. and Rohit Chand got him to Dominion Insurance;

- (v) The cover was for fire and he cannot remember if it covered cyclone also;
- (vi) After Insurance Proposal form was completed Defendant gave Insurance Policy over 4 Luke Street Property and the other properties (Exhibit P4);
- (vii) He had insured about nine (9) or ten (10) properties with Defendant;
- (viii) Plaintiff's insurer was New India and he went to Defendant after Rohit Chand pulled him to Defendant company and he knew Rohit Chand from 2007 or 2008 when he bought property at Vatuwaqa through Rohit Chand;
- (ix) Few days before December 2010, someone informed him about fire at Luke Street, Nabua property and when he came he saw the fire and people from Fire Authority were already there and he was not sure how fire started;
- (x) After he saw fire he called Rohit Chand who told him to go to Defendant's Office and lodge claim when he went to Defendant's office and lodged claim (Exhibit P5);
- (xi) The Claim Form was filled by Rohit Chand who he called and after the form was filled by Rohit Chand he signed it;
- (xii) He submitted four (4) quotations with the claim with two (2) for steel structure and two (2) for concrete building;
- (xiii) He filled form with the cheapest quotation from Chige Construction for \$310,000.00 (Exhibit P6);
- (xiv) After he submitted claim he was informed by Defendant that it will not pay because steel structure did not belong to Plaintiff but someone else and when he lodged document to prove property belonged to him then Defendant said that the steel structure was not insured and only damage was for \$1,700.00 plus VAT for concrete building;

- (xv) He did not accept the figure Defendant gave because damage was much more;
- (xvi) Property at 4 Luke Street, Nabua had two (2) different structures with one building being double storey concrete building in front and attached at the back is iron, steel and timber structure with different roof;
- (xvii) Iron, steel and timber structure was totally damaged by fire with part of concrete building;
- (xviii) Buildings were on the property when he bought it and apart from maintenance he did not do any structural work on the property;
- (xix) Both structures are attached to each other and Policy was taken out for whole building being concrete one and the one that caught fire;
- (xx) When policy was taken out he did not discuss about the buildings with Rohit Chand, he did not see Rohit Chand taking photos of building and Rohit Chand went to his office and he never went out with Rohit Chand to see the buildings;
- (xxi) When policy was taken out, no indication was given to him by anyone from Defendant company about which structure or building is covered;
- (xxii) After Defendant said about steel structure he obtained two (2) quotations and went and saw his lawyer who wrote to Defendant and called them when Defendant offered to pay \$2,000.00 which was too less for big fire loss;
- (xxiii) Lawyers Sherani & Co. wrote to Defendant on 26 April 2010 (Exhibit P7), and Defendant responded to the letter (Exhibit P8);
- (xxiv) On 14 July 2010 and 20 August 2010, Sherani & Co. wrote follow-up letters to Defendant;

- (xxv) After Lawyers wrote letters he was not contacted by anyone else regarding the claim;
- (xxvi) Defendant sent people to take photos about fire damage to property but they never went to see him;
- (xxvii) He was contacted by someone from McLarens Young International some five (5) years ago and he cannot remember the date;
- (xxviii) Defendant offered to pay him \$1,700.00 which figure came from a contractor which he did not accept as offer was too less;
- (xxix) After fire he took photographs of burnt property (Exhibit P10);
- (xxx) He is claiming \$310,000.00 and damages from Defendant Company.

29. During cross-examination PW:-

- (i) Agreed that he had the subject property insured through Agent, Rohit with other properties;
- (ii) Could not remember if policy was in existence since 2008, but stated that it was in 2008 or 2009;
- (iii) Stated that he remembered Rohit coming to his office and was not sure if he himself saw the properties but Rohit never went through each property with him;
- (iv) Stated that Rohit knew about properties to be insured from documents he gave to Rohit and he thought he prepared a list of properties for Rohit which included 4 Luke Street Property;
- (v) In reference to Engineers Certificate (Exhibit P3), agreed that he gave it to Rohit, in which the structure says two (2) storey and the size of the building is shown as 24m x 15m;

- (vi) Agreed that Plaintiff purchased the property in 2003 when the rear structure was in existence and the engineers certificate was done in 2003;
- (vii) Agreed that Engineers Certificate was limited to one building (24m x 15m) and it was obtained for cyclone cover;
- (viii) When it was put to him that Engineers Certificate could not be provided for rear structure because it was lean-to, he stated that he was not sure about this but later agreed that he is aware that cyclone cover could not be taken for lean-to structure;
- (ix) Agreed that rear structure was lean-to and was not sure if the structure was constructed without Suva City Council approval;
- (x) Stated that he was not sure if property was insured for cyclone but was sure it was insured for fire;
- (xi) In reference to Schedule to Policy (Exhibit P4) agreed that Policy says cover is for \$300,000.00 for fire and at bottom says extension - cyclone and when he contacted Rohit it was for fire policy and then had extension for cyclone cover;
- (xii) Disagreed that he asked Rohit to rely on Engineers Certificate and stated that he provided Engineers Certificate to Rohit because he asked for it and how he filled the form is up to him;
- (xiii) In reference to question 7 in Proposal Form (Exhibit P2) he stated that there were three (3) tenants instead of two and Cargo Broker and Allied Printing Suva were tenants in front building and he provided their names to Rohit;
- (xiv) In reference to Item 11 in Proposal Form (Exhibit P2) he agreed that building construction detail states as concrete wall, iron roof, concrete floor, concrete partition age as 15 years, area to be 24m x 15m and condition of building is good;

- (xv) Disagreed that he provided detail about roof, floor, wall and partition and he thought Rohit got it from Engineers Certificate;
- (xvi) Stated that there is nothing in the Engineers Certificate that says wall, floor or partition are of concrete and it does not say that there is two storey building;
- (xvii) Denied that details in question 11 of Proposal Form was provided by him;
- (xviii) Stated that building at rear did not have concrete walls or concrete partition;
- (xvix) In reference to question 11 in Proposal Form (Exhibit P2) when he was asked if Appendix A was completed he stated that he could not remember if form was filled in his office or Rohit took it;
- (xx) When asked how does Rohit know about adjoining building in relation to question 14 on Proposal Form (Exhibit P2) he stated that he does not know as to how Rohit knew and maybe he did the inspection;
- (xxi) Stated that him and Rohit never went around the building to inspect it and he could not remember if he mentioned to Rohit about the structure at the back or provided any details;
- (xxii) When it was put to him that he never provided any details about the structure at rear of the property to Rohit he stated that if he asked question he could have told him and if he did not ask question then he could not have told him;
- (xxiii) When it was put to him that after answering question 14 as "Yes" he never provided details he stated that if only Rohit asked he would have provided details;
- (xxiv) When it was put to him that he never told Rohit that there was structure at the back and he wanted to insure it, he stated that he told him to insure whole building and not separate building;

- (xxv) In reference to notation “DECLARATION - Please read carefully before signing” in the Proposal Form (Exhibit P2) he stated that he can see it but he never saw it when he signed;
- (xxvi) When it was put to him that when Rohit filled the Proposal Form (Exhibit P2), Rohit asked him questions and he provided the answers he stated “Yes, if he asked question, I provided the answers”;
- (xxvii) When it was put to him that when he signed the Proposal Form he failed to check what was written and what was not he stated that he never checked properly;
- (xxviii) Agreed that Plaintiff owned several properties and stated at that time it owned around nine (9) or ten (10);
- (xxix) Agreed that prior to Defendant, the property was insured with New India Assurance and he had been dealing with insurance companies prior to coming to Defendant;
- (xxx) When asked if he is aware that, if you have to insure property you have to give full details of property he stated “No, depends on Rohit, my Agent - what he wants to know I tell him”;
- (xxxii) When it was put to him that it was his responsibility that insurance company had all details of property he wanted to insure he stated that he was not sure, he did not know and was new for insurance;
- (xxxiii) When it was again put to him that it was his responsibility to provide details of property he stated that he tries his best and if Agent needs any information he provides;
- (xxxiiii) Agreed that quotation for \$310,000.00 (Exhibit P6) relates to structure at the back;
- (xxxv) When asked if he ever enquired with Defendant as to what portion of property was insured he answered “No, most work was done by Rohit Chand”.

30. In re-examination PW:-

- (i) Stated that his office is situated at Yatu Lau Arcade opposite Suva Bus Stand and the property insured is at 4 Luke Street, Nabua;
- (ii) Stated that he was not sure if any of the properties was inspected by Rohit;
- (iii) In reference to Engineers Certificate (Exhibit P3) he stated that property was insured for fire and cyclone;
- (iv) When asked if he can have cyclone cover without fire policy he stated “No, all policy cover cyclone and fire and when no engineers certificate, no cover for cyclone”;
- (v) Stated that no engineers certificate was taken out for lean-to structure and concrete building had corrugated iron roof;
- (vi) In reference to clause 1.2 in Engineers Certificate (Exhibit P3) he stated that he can only see two (2) storey and does not know the meaning of last sentence.

Defendant's Case

31. Defendant's first witness was Rohit Nilesh Chand of Ikacoka Place, Valelevu, Real Estate/Insurance Agent who took oath in English (“**DW1**”).

32. DW1 during examination in chief gave evidence that:-

- (i) His occupation is Real Estate/Insurance Agent and he is Insurance Agent for Defendant which he has been doing for almost nine (9) years;
- (ii) His work as Insurance Agent involves bringing in clients, filling proposal forms and forwarding to Defendant and they issue policy and forward to clients;

- (iii) He brought Plaintiff as client, filled the Proposal Form for fire and cyclone cover for 4 Luke Street, Nabua property which Proposal he organized two (2) or three (3) weeks before it was processed;
- (iv) He organized the proposal in early 2008 at 4 Luke Street;
- (v) When asked how did he know Tony wanted to insure that property he stated that, he is also a Real Estate Agent and sold property to Tony and when he informed Tony that he is also Insurance Agent then Tony told him to get quotation which he did in late 2007;
- (vi) After he sent quotation Tony told him that once insurance with other company expired he would let him know and he came back to him in early 2008 (January or February);
- (vii) Since Tony owned lot of properties he was looking at four (4) to five (5) properties and he told Tony that he will require engineers certificate;
- (viii) He visited sites, filled proposal form and waited for Tony to pay insurance premium;
- (ix) He did proposal for more than four (4) properties with some under companies name and some under his personal name;
- (x) He visited most properties on same day;
- (xi) He visited 4 Luke Street property on date he filled proposal with Tony and he communicated with Tony regarding the policy in his car outside 4 Luke Street property;
- (xii) Recognised the Proposal Form (Exhibit P2) which was for fire and cyclone and was filled on the same day and has Tony's signature;
- (xiii) He filled the Proposal Form on Tony's instruction and at Tony's request;
- (xiv) When filling the Proposal Form he had access to Engineers Certificate (Exhibit P3) which was provided by Tony;

- (xv) In respect to question 11 in Proposal he stated that some detail he looked at from road, area of building he got from Engineers Certificate and age of building (estimate) was given by Tony;
- (xvi) Details in question 7 of Proposal Form was provided by Tony and he basically saw it himself;
- (xvii) Details in question 15 of Proposal Form was provided by Tony and he visited the scene;
- (xviii) All those information was filled by him on the same day he visited the property and Tony was present with him when he filled the information;
- (xix) For 4 Luke Street, the concrete building that was in Engineers Certificate was insured;
- (xx) In reference to question 14 in Proposal Form, stated that details of adjoining property provided was that it was owned by Plaintiff but had no cyclone certificate or building plan;
- (xxi) He went to front portion of the property and since rear structure was not in the Proposal Form he did not have a look at it;
- (xxii) Rear structure was not covered in the Proposal Form because he was doing Proposal for both cyclone and fire but rear structure did not have engineers certificate;
- (xxiii) Tony was aware that Engineers Certificate does not cover that portion;
- (xxiv) Saw part of back portion was attached to the wall so he assumed roof was attached to concrete wall;
- (xxv) In reference to Item 2 being sum insured at \$330,000.00 stated that insurance value was given by Tony and he saw the valuation report;

(xxvi) After Proposal Form was filled he waited for Tony to pay premium which is determined by Defendant and once premium was received he dropped Form and cheque to underwriters at Defendant company;

(xxvii) At the same time he worked on insurance proposal for other buildings owned by Plaintiff;

(xxviii) Separate Proposal Forms were used for separate buildings.

33. During cross-examination DW1:-

(i) In reference to Proposal Form (Exhibit P2) stated that actual Policy taken out by Plaintiff was for fire and hurricane;

(ii) When asked why Form is called Fire Insurance Proposal and not Fire and Hurricane Proposal stated that it is the same form and at the back it says cyclone;

(iii) When asked if it was correct to say that Policy was for fire and extension cover was taken for Cyclone, stated "No, policy was for fire and hurricane but there is one Proposal Form".

(iv) Stated the current Proposal Form is for both fire and hurricane;

(v) Agreed that insured can take fire insurance proposal and not opt for cyclone;

(vi) Stated that engineers certificate is not required for fire insurance;

(vii) Stated that he could not recall the day proposal was organized as he does not keep record of meeting but keeps book for appointments which is not with him;

(viii) Stated that he made appointment with Tony in 2007 or 2008;

(ix) When it was put to him that Tony did not go with him to 4 Luke Street Nabua to inspect property but meeting took places at Yatu Lau Arcade he stated that;-

- (a) First meeting took place at Yatu Lau Arcade when they organized day for viewing;
- (b) Second meeting was to view the property;
- (c) Third meeting was to collect payment;
- (x) When it was put to him that he had no meeting with Tony at 4 Luke Street he answered “No” he had meeting, physically saw property at 4 Luke Street and other properties as well;
- (xi) Stated that he visited all properties same day and they were at Luke Street, one (1) in Lami; one (1) in Vatuwaqa; one (1) in Grantham Road; one (1) being Raiwaqa Post Office Building and one (1) in Salesi Road with Tony;
- (xii) It took around two to two and half hours and visit was done in his car registration No. ISEL;
- (xiii) When he was asked if it is possible that Tony was not with him when he visited 4 Luke Street property he answered “No, he had some properties he wanted me to look tenant for him”;
- (xiv) Stated that he filled the Form in front of particular property;
- (xv) Stated that he filled the Proposal Form which Tony checked and that Tony never signs empty Proposal Forms;
- (xvi) When asked if it is normal for him to fill Proposal Form for clients he stated that it depends on clients and if they want him to fill he fills it for them;
- (xvii) Stated that Tony was doing fire and cyclone both so he required Engineers Certificate;
- (xviii) In reference to writing in Proposal Form he stated that sometimes he writes in upper case and sometimes in lower case;

- (xix) Stated that all details were filled by him on the same day and him and Tony were in the car;
- (xx) Stated that when some details are missing Defendant calls Agent to come and complete the Form but in this case there was nothing as such;
- (xxi) Confirmed that writing in Items 2 of Proposal Form is his;
- (xxii) Stated that answer to Item 11 of Proposal Form is an error where it is stated "24 ft x 17 ft";
- (xxiii) Agreed that when he filled in question 11 in Proposal Form it means there is not more than one building;
- (xxiv) In reference to question 14 in the Proposal Form he stated that there is one building and one structure is attached to the building;
- (xxv) Stated 4 Luke Street has one building with illegal structure attached to that building;
- (xxvi) Agreed that Policy should be issued for \$330,000.00 and in reference to Exhibit P4 he stated that it is renewed after one (1) year;
- (xxvii) Stated that if you do not want cyclone cover you cross "Yes" on page 2 of Proposal Form (Exhibit P2);
- (xxviii) Agreed that option is given to Insured for cyclone extension cover under fire insurance proposal and insured chose cyclone extension option and that engineers certificate was given for cyclone cover only;
- (xxix) Stated that reason he said rear structure is illegal because on the same day he asked Tony that cyclone is only given if there is Engineers Certificate and Tony said no engineers certificate because that building is not under plan which meant it was illegal structure;
- (xxx) Stated that he has no confirmation to say structure was illegal;

- (xxxix) When it was put to him that no such exchange took place he stated that he enquired about engineers certificate and it was not his business and his business was main building;
- (xxxvii) Stated that \$330,000.00 was investment cost of the building;
- (xxxviii) Agreed that they could assume insurance sum for \$330,000.00 could be double storey main structure;
- (xxxix) Stated that Tony signed the Proposal Form in front of him and he could not remember if he read the declaration to Tony;
- (xl) When asked if Tony read the Proposal Form before he signed, he answered that "Tony never signs any document without reading";
- (xli) Stated that he could not remember why there is an asterix before the signature;
- (xlii) Stated that date should have been filled by Tony after signing;
- (xliiii) Stated that table on Proposal Form in respect to rates is filled by Agent and in this instance was filled by him;
- (xliv) Stated that quotation was given to Tony and the amount was filled on the last day when he received the money;
- (xlv) Stated that Proposal Form was filled except for premium as Tony had opportunity to negotiate until last premium payment date;
- (xlvi) Stated that amount being total for (a), (b), (e) and (f) of Table is correct;
- (xlvii) Stated that premium is to be paid on date policy is issued;
- (xlviii) Stated that he collected premium cheque payable to Defendant;
- (xlix) Stated that he informed insured why rear structure is not covered and reason why it is not covered;

- (xlv) Stated he is aware that claim is for fire cover and not cyclone cover and Proposal was for both fire and cyclone cover.
34. Defendant's second witness was Bulou Rabua of 4 Loloma Street, Ragg Avenue, Suva, Manager Group Underwriters and Support Services who took oath in English ("**DW2**").
35. During examination in chief DW2 gave evidence that:-
- (i) She is employed by Defendant as Manager Group Underwriters and Support Services and has been in Defendant's employment for twenty-one (21) years and has been in current position for fifteen (15) years;
 - (ii) Her duties include all underwriting work within guidelines of company policy; assisting Executive Director with renewal of insurance treaties; and assisting Executive Managing Director to look after Tonga and Vanuatu offices;
 - (iii) Procedure for taking out policy is that customer calls for the risk described by coming to office or through Agent or Broker and when quotation is provided and accepted they provide Proposal Form and after that Policy is issued. There is a period between the Proposal Form is received and policy is issued to negotiate the premium;
 - (iv) If business is brought to company then underwriter assists in completing Form and if Agent is involved then Agent assists in completing and if Broker the Broker organizes Proposal Form;
 - (v) When filling Proposal Form an officer looks at all questions and answers and information on Policy from Proposal Form;
 - (vi) Rohit Nilesh was the Agent involved in issuing Policy;
 - (vii) Quotation was given by Satish Badal, Team Leader - Underwriting Department and he also prepared the Policy when quotation was accepted, who is now retired;

- (viii) Policy is effective when premium is paid and when Policy is issued there is effective date on the Policy and sometimes the Policy is issued but premium is paid at a later date if it is agreed by underwriter and client;
- (ix) Amount to be insured is advised by client and that will be in the Proposal Form and rate of premium is determined on amount insured and nature of the property;
- (x) When Policy was issued on 1 February 2008, for Defendant property at 4 Luke Street was insured for \$330,000.00;
- (xi) In 2009 renewal, insured amount was reduced to \$300,000.00 and amount would be reduced at request of the insured;
- (xii) Believed that there was no query by Plaintiff regarding the insurance until the fire accident.

36. During cross-examination DW2:-

- (i) When asked if it is mandatory for clients to fill Proposal Form, stated that all information are provided by clients and Agents and underwriters can only assist;
- (ii) Their Agents are aware of this as Client has to sign off on what is in the Proposal;
- (iii) They have set of rules/regulations/policies which is to be observed by Agents and they know certain things they cannot do one being rating which Agents cannot do;
- (iv) Agent Agreement is approved by Reserve Bank of Fiji and the guideline is set by Defendant;
- (v) Defendant's guidelines is in writing and there is document between Rohit and Defendant which she did not have at time of giving evidence;

- (vi) She was not involved in issuance of the Policy which was issued on 1 April 2008, and she has a copy in her file which is outside the Court;
 - (vii) Change in sum insured from \$330,000.00 to \$300,000.00 was made by insured who had renewed and no query was raised;
 - (viii) Agreed that there must have been some conversation between parties to reduce sum from \$330,000.00 to \$300,000.00.
37. Defendant's third witness was Paulo Ralulu Junior of Sevura Wailoku, Assistant Manager Claims (**DW3**) who took oath in English.
38. DW3 in examination in chief gave evidence that:-
- (i) He is currently employed by Defendant as Assistant Manager Claims and has been working for Defendant for ten (10) years and two (2) months and in 2009, was employed as Senior Claims Officer;
 - (ii) His duties include receiving claims, discussing it with Claims Manager, delegate work to claims staff, when claim is processed advise client the decision, discuss the issue with client before issuing letter, deal with brokers in processing claim, deal with Ministry regarding workers compensation claims, inspecting properties subject to claim; sometimes carrying out risk inspection at request of underwriters prior to company accepting proposal and if claim exceeds his authorised limit then discuss claim with Claims Manager;
 - (iii) On 18 December 2009, when he was going to Vatuwaqa, he saw one building on fire and took photos not knowing building was insured with Defendant and when he returned to office on Friday afternoon he was informed that one of their clients suffered loss because of fire to his property. Later he found that it was the same property he took picture of;

- (iv) He took two sets of photographs, one set he took on 18 December 2009, and the other set he took on 21 December 2009, when he inspected the property;
- (v) After learning it was Defendant's client, he arranged to inspect the property on Monday;
- (vi) On Monday, he with an Insurance Agent went to inspect the property;
- (vii) At the site he saw fire damage to two (2) properties and the fire damage to concrete structure in front was damage to guttering, fascia board, smoke and heat damage to railings, smoke damage to top floor of building where tenants are living and there was extensive damage to the rear property;
- (viii) After inspecting the property, he came back to work, discussed with Claims Manager, showed him the photos when it was decided to appoint loss adjuster and he appointed Stanley Wetherall of McLaren Young International as loss adjuster who conducted his work and submitted series of reports in writing;
- (ix) Loss Adjustor confirmed that cover was for concrete building, there was fire damage to concrete building and offered to pay Plaintiff for damage to concrete building was rejected;
- (x) No offer for settlement was made for steel structure because it was not insured and offer for damages to concrete building was \$2,025.00 on basis of quotation provided by Sam Builders and Furniture Makers and loss adjustor recommended appointment of quantity surveyor to look at property and provide costs.

39. During cross-examination DW3:-

- (i) Stated that he was aware about Fire Policy (Exhibit P4). Plaintiff had with Defendant and it was Commercial. Fire Policy extended to include cyclone cover subject to engineers certificate.

- (ii) Stated the engineers certificate will be required for fire policy and that will depend on the risk.
- (iii) Stated that for lost property concerned there would be engineers certificate and cyclone certificate and he was not aware if both documents were provided because he only became involved when claim was made.
- (iv) Stated that he could not comment on as why policy extended to include cyclone on certain buildings only when all the buildings have cyclone cover.
- (v) Stated that he take steps in when there is actual loss and prior to that he has no business in that.
- (vi) Stated that as Senior Claims Officer he would not have seen any document prior to claim being lodged.
- (vii) Stated that when looking at claim he looks at Proposal Form filled by insured and all documents at that time.
- (viii) Stated that he will still look at Proposal Form if Policy was issued ten (10) years ago and renewed and Proposal Forms are kept for every client which is a mandatory requirement when Policy is taken out.
- (ix) When it was put to him that Plaintiff had number of Policies with Defendant for which no Proposal form was filled, he stated he "*would not know*".
- (x) Stated Proposal Form (Exhibit P2) is not dated
- (xi) Agreed that by completing question 11 on Proposal Form meant there is not more than one (1) building.
- (xii) Agreed that details are not provided in question 14 and stated that he did not know if it was an error.

- (xiii) Stated that question 11 refers to concrete structure that was insured and photos show rear portion of concrete structure.
 - (xiv) Stated that he discussed about missing date with Agent and Satish Badal, the Team leader who is now retired and that discussion was not written or minuted and there is nothing before court to confirm that discussions took place.
 - (xv) Stated that he differentiated between concrete structure and burnt structure.
 - (xvi) Stated that Proposal Form had concrete structure.
 - (xvii) Agreed that property insured was at 4 Luke Street, Nabua and 4 Luke Street mean all building on 4 Luke Street is insured.
 - (xviii) Stated that in case of two buildings, it is possible to have fire cover for one building only and fire cover with extended cyclone cover for other building and in such cases depending on Agent, he can fill one form or two forms.
 - (xix) Stated that Proposal Form should be filled by owner and in some cases where there is difficulty in writing English, he gets help of someone and in this case Agent was to fill and explain and Form is signed by insured.
 - (xx) Stated that he basically relies on the information on Proposal Form.
 - (xxi) Agreed that claim base is for fire loss cover only.
 - (xxii) When it was put to him that there was no exclusion of lean-to structure to not to be covered by the Policy he stated that it was declared and if it had been declared different premium would have been paid.
40. In re-examination DW3 stated that when Agent had clarification as to how Proposal Form is to be filled he would contact underwriter at Defendant.

41. Defendant's fourth witness was Stan Thomas Wetherall of 46 Flexton Street, Indiroopilly, Queensland, Australia, Chartered Insurance Loss Adjuster (**DW4**).
42. During examination in chief DW4 gave evidence that:
- (i) He works at Suncorp Insurance, Brisbane as Chartered Insurance Loss Adjuster and from 2004 to 2010 he was employed by McLaren Young International ("**MYI**") as Manager Fiji being in charge of Administration loss adjusting and inspection of property subject to claims.
 - (ii) He had thirty eight (38) years of experience and has been Chartered Loss Adjuster for twenty eight (28) years.
 - (iii) To be qualified to be Chartered Loss Adjuster you have to be Senior Assessor of Australia and New Zealand Insurance Institute and Fellow in International Federation of Loss Adjuster.
 - (iv) It takes eight (8) years to be Chartered Loss Adjuster, however there is ongoing professional requirements to maintain membership of those institutes.
 - (v) Defendant is long standing client of MYI and Defendant required MYI to undertake enquiries regarding claim by Plaintiff for damage by fire of property at Nabua.
 - (vi) Fire was on Friday and Defendant contacted MYI on following Monday.
 - (vii) After receiving request and in terms of procedure he contacted Policy Holder and met Policy holder at scene of fire with Iven Chan who was with him to get training and assist with language and inspected two (2) buildings on site, met with tenants, he took photographs and measurements.
 - (viii) After inspection he made enquiries with National Fire Authority and Police on cause of fire, received documents from Defendant and after seeing documents and what he saw on site he made arrangements with Defendant to clarify various issues.

- (ix) Had meeting with Defendant with purpose of determining whether Policy covered both buildings when he was told Policy was for concrete building and did not extend to cover structure at rear and Defendant needed further enquiries with Rohit as to what was covered.
- (x) After that he met Policy holder who provided various quotations and he informed Policy Holder that Policy covers only front building and asked him to provide quotation for front building and the Policy holder provided two (2) quotations for front building on or about May 2010.
- (xi) After that Defendant requested Builder by name of Sam to attend to building whose quotation given in mid-2010 was for lower amount.
- (xii) His contract completed in June 2010 when he departed Fiji.
- (xiii) He suggested to Defendant to clarify issues to extent of damage to front building by engaging quantity Surveyor and meeting with them and Policy holder to determine costs of repairs so that quantity Surveyor can assess cost of repairing that damage which he believes was fair and independent way to resolve the costs involved.
- (xiv) Form of correspondence with Defendant was verbal, in writing, e-mails and reports.
- (xv) He prepared first and second reports and about six or seven reports were prepared which were prepared by Ken McHugh, Chartered and Loss Adjuster who replaced him when he left Fiji.
- (xvi) Confirmed preparing Report dated 21 July 2010 (Exhibit D2), and confirmed the details such as date, subject, name of insured, location of property, date of incident and read paragraphs 1,2,3,7,8,9 and 10 of page 2 and page 3 of the Report.
- (xvii) Confirmed preparing Report dated 28 June 2010 (Exhibit D3), and confirmed date, subject, signature and read paragraph 1,2,3,4,5,6,7 and

8, 10 on page 2, paragraph 1 to 10 on page 3, paragraph 1 on page 4 of report, 8 and 10 on page 5.

- (xviii) Stated that quotation for Sam Builders for \$2,025.00 is in his Report and the quotation is addressed to Defendant.
- (xix) In reference to National Fire Authority Report dated 22 December 2009 he stated that it relates to 4 Luke Street and fire incident he attended to.
- (xx) Read contents of quotation of Foster Construction (Exhibit D5) and stated that it is one of the reports he referred to.
- (xxi) In reference to Report dated of 2 August 2010, from MYI to Defendant he stated that it was prepared by his replacement Ken McHugh, it is dated 19 August 2000, claim number is 46124, Plaintiff is insured, location of property is 4 Luke Street, date of incident is 18 December 2009, and relates to same incident.
- (xxii) He personally inspected the property, took measurements and photographs.
- (xxiii) Rear structure was extended to rear walls of front building and were two (2) distinct structures built at different times for different purposes.
- (xxiv) In reference to paragraph 5 on page 7 of Exhibit D3 he stated that reason for that is the difference in quotations.
- (xxv) He could not say for certain as to what would be the estimate damage to front building but stated that \$78,000.00 is overstated and \$2,000.00 by Sam is understated and he was not sure if Sam inspected inside of the building.
- (xxvi) One part of building was Golf Training Centre whose owner said it had damage in that area and he asked Tony to provide by email and to forward the details of repairs carried but not specific response was received.

(xxvii) He did not prepare assessment for rear structure as Defendant said it was not insured but he estimated re-building would cost over \$120,000.00 and Insurance Indemnity Value would probably be over \$75,000.00 to \$80,000.00 which are purely estimates.

43. During cross-examination DW4 :-

- (i) In reference to page 1 of Exhibit D2 (Report) confirmed that it was Fire Policy.
- (ii) In respect to last sentence of page 2 of Exhibit D2 in relation to steel, timber and corrugated iron structure he stated that it was his own observation and structure was there when Plaintiff bought and was occupied as bulk store for storage of spare parts and also had flats.
- (iii) Stated that front building had three (3) shops in lower level and residential flats on upper level and agreed that both buildings had residential flats.
- (iv) Stated that during site inspection he took photos which is not part of the Report but agreed that he would have relied on the photographs in doing the Report.
- (v) When asked if Defendant did inspection as stated at first paragraph on page 3 of Exhibit D2 he stated that he had meeting with Vikash Kumar of Defendant's Company and they came back to him saying Policy covered front building but not rear building.
- (vi) Stated that discussion took place in Defendant's office and letter was given to MYI and when asked if he has the letter he stated that he did not have the file and he relied on the letter in doing his report.
- (vii) In relation to letters dated 4 February 2010 and 25 March 2010, mentioned at page 2 of Exhibit D3 under heading "DEVELOPMENTS" he stated he relied on these letters in doing his report and 25 March 2010

letter, stated cover is only for front building but cannot recall what letters said.

- (viii) In reference to paragraph 2 on page 2 of Exhibit D3 stated that he met Tony and informed about Defendant's position and asked him to provide quote for front building and subsequently Tony provided quote for \$70,000.00 and \$80,000.00 for front building.
- (ix) Stated that he does not have copies of email and letters with him because he does not have the file with him.
- (x) Agreed that he thought letters sent by Defendant are important for conclusion reached in his report and stated that he can be only guided by them as to what they insure or not insure.
- (xi) Agreed that he made comments on liability after perusing those two letters.
- (xii) When it was put to him that if he did not receive letters he would not have reached the conclusion he reached, he stated that it is difficult to say and it is for insurer to instruct what property is insured.
- (xiii) Stated that in this instant there are two building and by looking at area of front building, the sum insured being \$300,000.00 was adequate for front building and not both buildings.
- (xiv) Stated that some questions on Proposal Form were left blank.
- (xv) Stated that Engineer Certificate is not required for fire only Policy but Fire Policy can cover other perils.
- (xvi) Stated that front building is rectangular shaped with rear building being L-shaped and rear of L-shaped building were up to close proximity of rear wall of front building.
- (xvii) Stated that he did not believe you could walk between concrete and steel buildings.

- (xviii) In reference to the first paragraph on page 4 of Exhibits D3, he stated that he does not have file and no email and that he visited Building Department of SCC and was informed and they could not assist without authority of owner.
- (xix) In reference to paragraph on page 5, (Exhibit D3) under heading “RECTIFICATION COSTS” he stated that he saw the quotations which were forwarded to Defendant and was attached to his report.
- (xx) In reference to paragraph 2 on page 6 of exhibit D3, he stated that it was rear wall of front building.
- (xxi) In reference to paragraph 4 on page 6 of Exhibit D3 he agreed that conclusion arose because of letter from Defendant and stated that if not then at subsequent meeting.
- (xxii) When it was put to him that Report was incomplete without quotation and letters, he stated that report is complete and that somewhere along the line attachments got removed.
- (xxiii) Stated Reports he signed were prepared by him and subsequent reports were prepared when he left MYI for Australia.

Issues for Determination

44. Given the fact that there is no dispute between the parties that the concrete building was insured against fire and cyclone the only issue that needs to be determined by the Court are:-
- (i) Whether the steel structure was covered by Policy against fire;
 - (ii) If issue (i) is answered in affirmative then what is the amount of damages to the steel structure?
 - (iii) What is the amount of damages for concrete building?

Whether the steel structure was covered by Policy against fire

45. PW (Song Hua Joe also known as Tony) is Director of Plaintiff Company and it became apparent that he was managing the Plaintiff company and related companies including managing companies properties.
46. PW's main evidence was that he did not fill the Proposal Form and only signed it because he does not understand English.
47. After analysing PW's evidence and demeanor this Court believes that even though PW does not have perfect command of English he does not seem to be a person who will sign documents such as Insurance Proposal Form without checking details in Form.
48. DW1 in his evidence in chief (paragraph 33 (xxxv) of this Judgment) testified that PW will not sign any Proposal Form without checking the details. This Court has no reason to doubt DW1's evidence in this regard.
49. PW being owner/manager of nine (9) or ten (10) properties at one stage should have been quite familiar with the requirements of completing the Proposal Form.
50. This Court accepts DW1's evidence that PW accompanied DW1 in DW1's vehicle to inspect certain properties including property subject to this proceedings and the Proposal Form for the subject property was completed in DW1's vehicle outside the subject property with PW (Tony).

PW during examination in chief gave evidence that Rohit Chand (DW1) did not ask any questions except asking for engineers certificate as appears in paragraph 28(ii) of this Judgment.

However, during cross-examination when it was put to him that when Rohit filled the Proposal Form (Exhibit P2), Rohit asked him questions and he provided the answers he stated "Yes, if he asked question, I provided the

answers” as appears at paragraph 29(xxvi) of this Judgment. This obviously means PW was asked questions by Rohit when Proposal Form was filled.

51. DW4 in his evidence testified that he informed PW (Tony) that steel structure is not covered and requested PW to provide quotation for concrete building only to which PW obliged by providing two (2) quotations for \$75,000.00 and \$80,000.00 (paragraph 39(viii) of this Judgment).
52. Plaintiff by obliging to give quotation for concrete building only and without any protest. This Court is of the view that the Plaintiff to certain extent accepted that only concrete building was insured against fire and cyclone.
53. During cross-examination of DW1 and DW4 Learned Counsel for the Plaintiff had put lot of emphasis on the Proposal Form (Exhibit P2) in that:-
 - (i) It was not dated;
 - (ii) Question 11 - which states “Building Construction Details (if more than one building - complete Appendix A instead of this question)”
 - (iii) Question 14 - Does the building(s) adjoin another building. Yes/No
If the answer to question 14 is yes, provide; Owner..... Occupation....”

Mere fact that the Proposal Form is not dated does not make the Proposal Form invalid and it is not disputed that Policy was issued on basis of the information on the Proposal Form.

There is no evidence that Appendix “A” was filled and by the Insurance Agent compiling details on the Proposal Form itself shows that the concrete building was to be insured only.

54. Plaintiff by her Counsel at paragraph 4.07 to 4.11 of Submissions filed submitted as follows:-

“4.07 It is submitted that the Fire Policy Schedule is very clear that it forms and is attached to the Fire Policy (attached is the Commercial Fire Policy Contract ref.01/10/2000).

4.08 Under the definitions on page 1 of the Contract:

Buildings means the buildings and other structures including but not limited to the appurtenances, plant, fixtures, fittings, pipes and cables pertaining to any of them, all located in or about the premises. Also including any fixed signs and lettering, tanks, walls, gates and fences.

Situation means the location of the property insured.

The Property Insured means the property as described under the relevant section of the Policy Schedule, and is the Insured’s own or held by the Insured jointly or in trust or in commission and for which the Insured is legally responsible.

4.09 On page 3 of the Contract, under the Optional Peril - Cyclone:

This peril is applicable only when the Dominion has agreed to extend the policy to include loss or damage resulting from Windstorm, Gale, Hurricane or Tropical cyclone (referred to herein as cyclone) as shown on the attached schedule and an additional premium has been paid and is subject to the following conditions:

- 1.....
- 2.....

4.10 It is therefore submitted that under the said Policy, on the first page of the Fire Policy Schedule, the Cover Details were for **commercial fire** and the situation was given as **Building at Lot 9 DP 1433, 4 Luke Street, Nabua, Suva** under the category for **Buildings** and the sum insured was for \$300,000.00.

4.11 Since the Buildings are defined above in paragraph 4.08 to include what is on the premises and the situation means the location of the property insured, we submit that the front and rear structures were meant to form part of the Fire Policy.”

55. It is well established that contract of insurance is contract of good faith and this applies to both insured and insurer.

56. If there was no intention on the part of the insurer to insure the steel structure then the insured cannot and should not go behind the definition of building in the Policy to cover the steel structure. To do so will obviously defeat the principle of good faith.

57. Much has been said about questions 11 and 14 in the Proposal Form (Exhibit P2).

58. Question 11 is as follows and the details filled are as follows:-

“[11] BUILDING CONSTRUCTION DETAILS (if more than one building - complete Appendix A instead of this question)

(a) Walls CON (b) Roof IRON (c) Floors CON (d) Partitions CON

(e) No. of Floors 2 (f) Age 15 (g) Area 24ft x 15ft (h) Condition Good”

59. This question requires details of building on the property.

It is not disputed that Appendix “A” was not completed and the description of building is that of the concrete building. The area mentioned though should have been 24m x 15m rather than 24ft x 15 ft. There is no mention of steel structure in answer to this question.

60. Question 14 and response is as follows:-

“[14] Does the building(s) adjoin another building YES/NO

If the answer to question 14 is yes, provide; Owner _____ Occupation _____”

This question relates to building adjoining the building on 4 Luke Street and not building constructed on 4 Luke Street Property.

61. It is therefore wrong to take it that by answering “Yes” to question 14 it meant building constructed on same property (4 Luke Street) because if that was so then why would details of owner of adjoining building and owners occupation will be requested. Common sense dictates that this question relates to building not constructed on 4 Luke Street but building constructed on property adjacent to property at 4 Luke Street.

62. Having found that the Insurance Policy covered concrete building there is no need to determine issue 2.

Damages to Concrete Building

63. Defendant obtained quote from Sam Builders and Furniture Makers (Exhibit D4) which is as follows:-

- “1. *Facia Board*
2. *Guttrings*
3. *2 PC Louvre Frame*
4. *Paint to Back Wall*
\$1,800.00 Plus VAT \$225.00
Total \$2,025.00”

64. DW4 gave evidence that at his request PW (Tony) provided two quotations for \$78,800.00 and \$83,250.00 to repair concrete building (Exhibit D3).

65. The actual amount of quotation and the quotations submitted are also mentioned under the heading “RECTIFICATION COSTS” on page 5 of report dated 28 June 2010 from MYI to Defendant (Exhibit D3) which reads as follows:-

“The Insured’s claim form is dated 21.12.09 and although the value of the claim has not been stated, attached to the claim form were two quotations for reconstruction of the building at the rear from (1) Fortech Construction Ltd dated 22.12.09 \$341,143 VIP and (2) Chige’s Construction Co. Ltd dated 23.12.09 for \$310,000 VIP.

Subsequently on 17.05.10 Tony provided two further quotations being (1) Vinz Workz & Joinery Ltd dated 8.05.10 for \$83,250 VIP and (2) Chige’s Construction Co. Ltd dated 6.05.10 for \$78,800 VIP and copies are attached for your review.”

66. Even though copies of the quotation provided by PW (Tony) to DW4 (Weatherall) and attached to the report was not produced in Court, this Court has no reason to doubt DW4’s evidence that such quotations were provided by PW (Tony) to DW4 and as per DW4’s evidence got detached from the report somewhere along the way.

67. DW4 also gave evidence that the quotation provided by Sam Builders (Exhibit D4) was too low and this could be because of the fact that Sam Builders may not have inspected the damages to the interior of the concrete building. This is

confirmed by Sam Builders quotations which is only for exterior of concrete building.

68. DW4 also gave evidence that quotations for \$78,800 and \$83,250.00 were provided by PW (Tony) for repairs to concrete building was on higher side and in his report he recommended that a quantity surveyor be appointed to assess the damage to concrete building.
69. There is no evidence that quantity surveyor was engaged to determine the cost of repair to concrete building or Defendant obtained another quotation in respect to concrete building including interior of concrete building.
70. Even though DW4 stated that the quotation provided by PW (Tony) was on higher side he did not say why is it that so or what would be the cost of repairing the concrete building.
71. Accordingly this Court has no option but to accept that it would have cost \$78,800.00 to repair damages to interior and exterior of concrete building.

Interest

72. Since no attempt has been made by Defendant to engage a quantity surveyor to assess the cost of repair to the concrete building as recommended by MYI in its report dated 10 June 2010 (Exhibit D3) and the offer to settle the claim was too low and without regard to damages to the interior of the concrete building it is just and fair that interest be awarded. This Court, therefore awards interest at the rate of four percent (4%) per annum from date of Writ of Summons to date of Judgment.

Costs

73. The Court takes into consideration:-
 - (i) The trial lasted for two (2) days and both parties filed Submissions;
 - (ii) The Plaintiff's position has been that the steel structure was included in the Fire Policy whereas Defendant's position was that steel structure was not included and it is this dispute that was major part of this proceeding.

73. Having ruled in favour of the Defendant as to whether the steel structure was covered by the Policy or not, it is just and fair that each party bear their own costs of this action.

Conclusion

74. It is adjudged that judgment be entered in favour of the Plaintiff in the sum One hundred thousand and six hundred dollars (\$100,600.00) which said sum is made up as follows:-

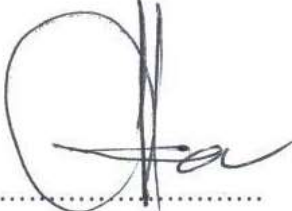
Judgment Sum	\$ 78,800.00
Interest at 4% per annum from 29/11/2010 to 31/10/2017 (2529 days)	<u>\$ 21,800.00</u>
	<u>\$100,600.00</u>

Orders

75. I make following Orders:-

- (i) Defendant do pay Plaintiff a sum of One Hundred Thousand and Six Hundred Dollars (\$100,600.00) inclusive of interest;
- (ii) Each party bear their costs of this action.




.....
K. Kumar
JUDGE

At Suva
31 October 2017

Sherani & Co. for the Plaintiff

Diven Prasad Lawyers for the Defendant