IN THE SUPREME COURT OF SEYCHELLES

Peter Payet

of Victoria, Mahe, Mahe **Plaintiff**

Vs

State Assurance Corporation of Seychelles
of Pirates Arm Building,
Independence Avenue, Victoria

1st Defendant

AND

Philmarjan Brokerage Services Limited

Of Premier Building, Victoria, Mahe **2nd Defendant**

Civil Side No: 116 of 2001

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Mr. Francis Chang-Sam for the plaintiff

Mr. D. Lucas for the 1st defendant

2nd Defendant - In Person

D. Karunakaran, J.

JUDGMENT

The plaintiff in this action seeks this Court for a judgment ordering the 1st defendant, State Assurance Corporation of Seychelles (SACOS) to pay him

(a) *the sum of R380.600, being the sum for which he had insured his vessel "Agape" with the 1st Defendant, and a sum equal to the interest which the plaintiff is liable to pay to the Development Bank of Seychelles on the loan he obtained from the Bank for the purchase of the said vessel;*

(b) *Alternatively, if this Court finds that the 1st Defendant was right in repudiating the insurance policy - because the instruction to issue cover was received by the 1" Defendant after the 15th January, 1999 - for an order requiring the 2nd Defendant to indemnify the Plaintiff in the sum of R380,600, being the sum for which the Plaintiff had instructed the 2nd Defendant to obtain cover from the 1st Defendant and together with an amount sufficient to cover all the interest, which the Plaintiff is liable to pay to the Development Bank of Seychelles on the loan the Plaintiff had obtained for the purchase of the said vessel.*

It is not in dispute that the plaintiff was at all material times the owner of a vessel known as "Agape". The 1st Defendant was at the material time and is a statutory corporation carrying on business as an insurer and the 2nd

Defendant was at the material time a limited liability company carrying on business as an insurance broker. On or about the 20th December, 1998 the Plaintiff sought the services of and appointed the 2nd Defendant as its insurance agent and broker for the purpose of negotiating a marine hull insurance policy in respect of his vessel "Agape" with the 1st Defendant. According to the plaintiff, following the negotiation between the 1st and 2nd Defendants, the 1st Defendant on the 28th December, 1998 made an offer to the Plaintiff through the 2nd Defendant for a hull marine insurance policy providing for cover for the Plaintiff's vessel "Agape" quoting the premium in the sum of Rs22, 989. 00. It is also the case of the plaintiff that the 2nd Defendant, through its Marketing Manager Ms. Jane Servina, submitted the aforementioned offer to the Plaintiff on the 6th January, 1999. On the same day, the Plaintiff confirmed his acceptance of the offer made by the 1st Defendant by instructing the said Jane Servina of the 2nd Defendant to place immediate cover for his vessel "Agape" with the 1" Defendant and which placement the 2nd Defendant thereafter confirmed to the Plaintiff.

Notwithstanding the said offer and confirmation of acceptance, according to the plaintiff, he was on the 12th January, 1999 asked to complete a new proposal form in respect of the same insurance cover for his vessel. The Plaintiff completed and returned to Jane Servina of the 2nd Defendant the aforementioned proposal form on the 15th January, 1999 and also immediately paid the agreed premium of R22, 989 to Jane Servina, the representative of the 2nd Defendant, and instructed her that the cover should take effect on the l5th January, 1999 itself. Ms. Jane Servina assured the Plaintiff that the cover for "Agape" would take effect immediately on the 15th January, 1999 and that she had obtained confirmation of this from the officers of the 1st Defendant.

According to the plaintiff, on the 31st March, 1999 the 1st Defendant issued a marine hull insurance policy (hereinafter referred to as the "policy") in respect of "Agape" wherein it is stated that the policy took effect from the 15th January, 1999. It is further averred in the plaint that prior to the Plaintiff receiving the policy document, on or about the 16th January, 1999 the Plaintiffs vessel "Agape" went missing. The Plaintiff duly notified the authorities, including the police and port, of the disappearance of his vessel "Agape" and in addition contacted various persons first on Praslin, La Digue and Mahe and then in neighbouring countries such as Mauritius and Reunion for the purpose of verifying whether they had seen his vessel but none of them had.

After attempting by all possible means to relocate his vessel the Plaintiff notified the 1st Defendant of the disappearance of the vessel. The Plaintiff only became aware of the policy requirement to notify the Defendant after he was provided with the policy document. The 1st Defendant issued the policy document on the 31st March, 1999.

The 1st Defendant by a letter dated 26th April1999, firstly purported to repudiate the insurance policy on the basis that the Plaintiff was late in notifying it of the disappearance of the vessel.

On being advised that the Plaintiff only became aware of the policy obligation to notify the 1st Defendant after he received the policy after the 31st March, 1999 the 1st Defendant by a letter dated 28th June, 1999 then purported to repudiate the policy on the different ground that the vessel was already lost when it was instructed by the 2nd Defendant to issue the cover for the Plaintiffs vessel. It is also the case of the Plaintiff that according to the instructions he gave to the 2nd Defendant he specifically asked the 2nd Defendant to obtain cover for his vessel from the l5th January, 1999 and further that he in fact paid to the 2nd Defendant the agreed premium on the15th January, 1999.

The Plaintiff has further averred that he was assured by the 2nd Defendant that his instructions above-referred have been complied with and that cover would be effected by the 1st Defendant with effect from the 15th January, 1999. According to the plaintiff, he had a valid policy covering his vessel at the time of its loss and in accordance with that policy the 1st

Defendant is under an obligation under the policy to compensate him for the sum of R380, 600 for which he has insured his vessel under the policy. Despite repeated requests to pay the sum insured above-mentioned the 1st Defendant has refused and continued to refuse to do so.

Alternatively, it is the case of the plaintiff that if the instruction to cover the Plaintiff's vessel was only given by the 2nd Defendant to the 1st Defendant, then the 2nd Defendant failed in its obligation to carry out the Plaintiffs specific instruction to effect cover for his vessel with effect from the 15th January, 1999. As a result of the said failure of the 2nd Defendant, the 2nd Defendant is liable to compensate the Plaintiff in an amount equal to R380, 600 being the sum for which it instructed the 2nd Defendant to insure his vessel with the 1st Defendant.

Moreover, it is the case of the plaintiff, as both the 1st and the 2nd Defendants were aware that the Plaintiff had obtained a loan from the Development Bank of Seychelles for the purchase of the vessel and that the Bank has an interest in the vessel, the party liable to indemnify him for the loss of his vessel should in addition be liable to indemnify him for all the interest he is liable to pay to the Development Bank of Seychelles in respect of his loan taken for the purchase of the vessel. Hence, the plaintiff seeks judgment as first-above mentioned.

On the other side both defendants deny liability. It is the case of the 1st defendant that the Plaintiff, through the 2nd Defendant, representing himself as the owner of the vessel "AGAPE" requested a quotation for a marine hull Insurance Policy from the 1st Defendant in respect of the said vessel. The 1st Defendant accordingly provided a quotation to the 2nd Defendant. However, the 1st defendant did not receive any confirmation of the offer or quotation from the plaintiff. Particularly, on the 6th January 1999

the 2nd Defendant through its representative Jane Servina did not confirm any placement of cover of the vessel “AGAPE” with the 1st Defendant.

Further it is the case of the 1st Defendant that confirmation of acceptance of the quotation, in respect of the premium payable for the insurance of the vessel “AGAPE”, was only made to the 1st Defendant by the 2nd Defendant, on the 21st of January 1999.

According to the 1st Defendant that the agreement to provide insurance cover for the vessel “AGAPE” was only concluded on the 21st January 1999, when the 2nd Defendant confirmed that the quoted premium payable was acceptable to his client, the Plaintiff. Accordingly, the 1st Defendant issued the said policy relying on the information set out in the Plaintiffs proposal form and that too, only when the 2nd Defendant had confirmed that his client, the Plaintiff, had agreed to pay the premium quoted.

The 1st Defendant further avers that it was made aware of the loss or missing of “AGAPE” some three months or so after the incident of disappearance. It is the case of the 1st defendant that as a reasonable and prudent businessman and person, and if acting in good faith the Plaintiff should have known and should have informed the 2nd Defendant or the 1st Defendant of the said loss or missing of the vessel promptly. However, the plaintiff did not do so. The 1st Defendant avers that it would not have

entered into and issued the insurance policy (Exhibit 11-A) had it known that the subject matter the vessel had gone missing or was lost.

According to the 1st Defendant, the agreement to effect cover for the period from the 15th of January 1999, was only concluded on the 21st January 1999, when the 2nd Defendant confirmed that the quoted premium was acceptable. By that time, the Plaintiff had already known that the subject matter - the vessel "AGAPE" - had gone missing and therefore, the plaintiff should have in good faith informed the 1st Defendant of the fact. The 1st Defendant further avers that prior to the 21st January 1999, when the 2nd Defendant confirmed that its client - the Plaintiff - had accepted the quotation of Rs22, 989.O0 for the insurance of the vessel "AGAPE", no agreement had then been concluded with the 2nd Defendant or the Plaintiff in respect of insurance cover for the said vessel "AGAPE". The 1st Defendant further avers that the vessel "AGAPE" was allegedly "lost" on the 16th January 1999, and that the said fact should have been made known to the 1st Defendant in good faith and before finalisation of the insurance contract to insure the "AGAPE" on the 21st January 1999. Had the Plaintiff exercised good faith and made full and material disclosures to the 1st Defendant, in the absence of the subject matter, the vessel "AGAPE" the 1st Defendant claims that it would not have insured the said vessel. The 1st defendant avers that the plaintiff's nondisclosure in this respect amounted to a breach and hence the contract of insurance was void ab initio.

Further, the 1st Defendant avers that although the Plaintiff knew that the loss of the vessel "AGAPE" occurred on the 16th January 1999 when it was not insured, he falsely represented or misrepresented to the 1st Defendant that the vessel was by the 21st January 1999, still in his possession and custody and caused SACOS to enter into the contract of insurance. Hence, the contract of Insurance is void ab initio. In the alternative, the 1st Defendant avers that the Plaintiff was advised that the contract of insurance in respect of the "AGAPE" was void ab initio and that the Plaintiff accepted that the above was so void, by his acceptance of the reimbursement of his premium which sum was paid to and accepted by the Plaintiff on the 3l of March 2001. Hence, the 1st Defendant avers that the

Plaintiff cannot now make any claim against the 1st Defendant as the Plaintiff has no cause of action against the 1st Defendant. In the circumstances, the 1st Defendant avers that it is not liable to the Plaintiff

Further the 1st defendant avers that in the event that there had been a valid contract of insurance in respect of the "AGAPE", (the same is denied) still the Plaintiff was not covered for as he was in breach of the said insurance policy by reason of his having lent the said AGAPE to its alleged previous owner. The 1st Defendant also avers that the said insurance policy only covered claims in respect of loss or damage arising from the use of the vessel AGAPE when on charter business.

Further the 1st Defendant avers that the Plaintiff failed to disclose the material fact to the 1st Defendant when he failed to inform the 1st Defendant that he was to loan or lend the "AGAPE" to it former owner who was due to leave for France a few days later. Besides, the 1st Defendant avers that had it been made aware that the "AGAPE" would not be under the control and possession of the Plaintiff, as a prudent insurer it would not have insured the said vessel. Hence, the 1st Defendant claims that it is not liable in any sums to the Plaintiff as the Plaintiff has no cause of action against it.

WHEREFORE the 1st Defendant prays this Honourable Court to dismiss the Plaint with costs.

On the other side, the 2nd Defendant in its defence has averred that the plaintiff, the owner of the vessel "AGAPE" did approach the 2nd defendant for the purpose of procuring a marine hull insurance policy for that vessel. The 2nd defendant through its Marketing Manager Ms. Jane Servina promptly and in good time took all steps necessary to obtain the Insurance from the

1st defendant. In accordance with the instructions given by the plaintiff the 2nd defendant obtained a policy cover for the period commencing from 15th January 1999 to 14th January 2000 in respect of the said vessel. The premium of Rs22, 989.O0 was received from the plaintiff and the same paid to SACOS in the usual manner in accordance with the agreement that existed between the 1st and the 2nd defendants. According to the 2nd defendant, although the insurance cover had already been effected by the 1st defendant from 15th January 1999 as per the instructions given by the plaintiff, after two months, the 1st defendant refunded the premium to the 2nd defendant by crediting that sum into the 2nd defendant's account with the 1st defendant. On 13th March 2000, the 2nd defendant in turn, returned the said sum back to the plaintiff by Barclays Cheque No 213321. In the circumstances, the 2nd defendant contends that it is not liable to compensate the plaintiff for any reason whatsoever and so prays the Court to dismiss the plaintiff's claim against the 2nd defendant.

The plaintiff Mr. Peter Payet - PW2 - testified in essence that in the middle of November 1998, he purchased the vessel "Agape" from one Mr. Aque Roger, a French National for the price of SR380, 000/- vide invoice dated 11th November, 1998 in exhibit P1. He paid the entire purchase-price to the seller by making two payments. The first payment he made was a cash payment in the sum of SR130, 000/- He paid this sum as a deposit towards the purchase price and thereupon took possession of the vessel. For the balance of the purchase price i. e Rs 250,000/- the plaintiff took a loan from the Development Bank of Seychelles (DBS) vide exhibit P9 and paid

that sum to the seller by a DBS cheque No. 244824 dated 24th December 1998. The DBS secured that loan by taking a mortgage on the plaintiff's property Title No. S1695 vide exhibit P10 and charging interest on the loan amount at 8% per annum. Be that as it may, the plaintiff soon after obtaining possession took the vessel to the slipway of one Mr. Raymond Pool, a boat- builder for repairs as one its engines was not in good condition. Mr. Raymond Pool carried out the repairs and the plaintiff supplied to him the necessary materials and the spare parts required for fixing the engine. The plaintiff testified that he purchased those materials and spares from different sources like Marine Equipment Services (Pty) Limited, SMB, Dinesh Auto Parts (Pty), Naval Services Limited etc. The plaintiff also produced a number of receipts in exhibit P2, P3, P4, P5, P7 and P8 evidencing those purchases made during the relevant period. Soon after the completion of the repairs, the plaintiff wanted to have his vessel insured at the earliest as he was intending to start his business of boat chartering. Hence, in mid December 1998, the plaintiff retained the 2nd Defendant - the insurance broker to whom the plaintiff was a regular client - for insurance brokerage services and requested them to arrange for a Marine Hull Insurance in respect of his vessel "Agape". The 2nd defendant agreed to render services and accordingly, held negotiations with the 1st defendant (SACOS) to obtain the insurance for the vessel. After obtaining the necessary particulars and documents from the 2nd defendant, the 1st defendant eventually on the 14th January 1999 issued a debit note (exhibit P29) to the plaintiff through the 2nd defendant, featuring essentially the following:

Transaction Date: 14th January 1999

Type of Policy: Hull Insurance

Policy No: MAHULL000421

Period of Cover: From 15th January 1999 to 14th January 2000

Sum Insured : Rs880, 600/-

Premium Total Due: Rs 22, 989/-

Immediately, upon receipt of the said debit-note on the 15th January 1999, the plaintiff effected the payment of *Rs 22, 989/-* to the 2nd defendant for the total premium due vide exhibit P14. Following the issuance of the "debit note" and payment of the premium, the 1st defendant issued a cover-note entitled *"document of endorsement"* (in exhibit P11) to the plaintiff confirming essentially, all the particulars contained in the "debit note" along with other terms and conditions of policy, which inter alia reads thus: "*Policy is also subject to an excess of SR 75, 000/- in respect of total loss".*

After about three months presumably, of bureaucratic delay, the 1st defendant finally, on the 31st March 1999, issued a copy of the relevant "Policy Document" to the plaintiff through the 2nd defendant insuring the vessel "Agape" for the period of cover commencing *from 15th January 1999 to 14th January 2000.* The sequence of events leading to the issuance of the above "Insurance Policy" (Exhibit 11-A) by the 2nd defendant is well recounted chronologically in the 2nd defendant's letter dated 28th January 2000 signed by Ms. Jane Servina, addressed to the plaintiff's counsel. This letter in exhibit P22 reads thus:

"THE AGAPE

Around 20th December 1998 an Evaluation document was sent to SACOS for a quotation for the above vessel.
About four days later a quotation was given by Mr Andy Marie, but as the quotation was too high I realised. The same day I tried to discuss with Mrs. Jakie Chetty for a better deal and Mrs. Chetty told me that she would need some time and she would get back to me as soon as possible.
On the 28/12/1998 we received a quotation in writing sent by fax for an amount of R22, 989.00.

On the 6/1/1991 submitted the faxed quotation to Mr Peter Payet at his office at Plaisance. After checking the details Mr. Payet agreed, he asked me to place cover with immediate effect. I immediately confirmed acceptance of premium by telephone while still in Mr Payet's office and asked Mrs. Chetty to effect insurance cover with immediate effect. This was made in the presence of the ex boat Owner, Mr Payet himself, Mr D Dine and Mr Payet's secretary.

On the 12/1/1999 I received a phone call from Mr Marie requesting on behalf of Mrs. Chetty to fill a new proposal form based on the Surveyor's reports. As Mr Payet was absent from his office I left a message and the proposal form with his secretary to get it completed. Mr Payet returned the completed form to our office on 15th January 1999 and again immediately the form was sent to SACOS as requested.
I was also asked by Mr Marie on 15/1/1999 to confirm in writing the interest that Development Bank had in the said property. This was done.
Again on the 21/1/1999 Mr. Marie requested for payment re: the above and also confirmed that the insurance had been effected as from 15/1/1999 to 14/01/2000, A Debit Note confirms this.

On behalf of the client on several occasions we requested for his insurance policy from SACOS but unfortunately each time there was an excuse given why the document was not ready. A copy of the policy document was finally issued on 3 l March, 1999.

(Sd) ***Jane Servina"***

However, in the mean time, on the 18th of January 1999 that was, three days after the vessel "Agape" was insured, something unfortunate happened. The vessel went missing from the yachting marina, wherein the plaintiff used to moor his vessel. The plaintiff testified that after the completion of repairs and securing the insurance on 15th January 1999, he had moored the vessel at the yachting marina in Victoria. The weekend ensued. The plaintiff had then given permission to the previous owner Mr. Roger to sleep in the vessel. On Monday the 18th January 1999, when the plaintiff went back to the marina, to his shock the vessel was missing from the place where it had been moored. He immediately reported the matter to the Port Authority in Victoria and personally started searching for the missing vessel in the ports around Mahe, Praslin and La Digue. The vessel "Agape" was nowhere to be seen. He continued the search for about two days but could not get any trace of its presence in Seychelles waters. On 19th of January, 1999 the plaintiff reported the matter to the police (vide exhibit P16) but of no avail. On 26th January 1999, the plaintiff went to Mauritius vide immigration entries made in his passport (exhibit P17) and searched for the vessel "Agape" in the ports around Mauritius as that is the nearest foreign shore. He could not see the vessel anywhere. One Ms. Cecilia Rosemary Horti (PW1), the Financial Manager of SIDEC testified that she also accompanied the plaintiff to Mauritius as she was then going there on an official and was with him, while he was looking for the vessel in the ports of Mauritius. Despite all reasonable and sincere efforts, the plaintiff could not find the missing vessel "Agape" anywhere either in Seychelles or Mauritius since its disappearance on 18th of January 1999. After attempting all possible means to relocate his vessel, the Plaintiff notified the 1st Defendant of the disappearance of the

vessel. The Plaintiff became aware of the policy requirement to notify the 1st Defendant only after he was provided with the policy document. The 1st Defendant issued the policy document only on the 31st March, 1999. Following the above episode and total loss of his vessel "Agape", plaintiff lodged his claim with the 1st defendant requesting payment of the sum insured. But the 1st defendant refused to pay the plaintiff's claim according to the plaintiff, in breach its obligation under the Policy of Insurance.

The 1st defendant called two of its employees namely, (1) Ms. Jacqueline Chetty, General Manager of SACOS (DW1) and (2) Mr. Andy Marie, Operations Manager of SACOS (DW2), to testify in support of the defence. DW1 testified that on or around 28th December 1998 SACOS provided a quotation upon request made by the 2nd defendant for the premium in respect of the insurance in question. The Operation Manager, DW2 was the one dealing with the plaintiff's Policy in this case. DW1 further testified that according to the records maintained by SACOS, the Proposal Form dated 15th January 1999 (exhibit D2), the Valuation Report and the Engineer's Report were delivered to SACOS only on 21st January 1999 by the broker, the 2nd defendant with a covering letter vide exhibit D1. Besides, Ms. Chetty stated that on the 6th January 1999, she did not make any confirmation over telephone with Ms. Jane Servina that insurance in question would take effect from 15th January 1999. According to Ms. Chetty, she did go to work on the 6th January 1999 as she was sick that day and went to see Dr. Jivan, a private Medical Practitioner. In the same breath, she stated that she went back to another doctor by name Dr. Kirkpatrick, a medical officer in Charge

of Anse Aux Pins Clinic and got one-day sick leave from that doctor. Further, Ms. Chetty testified that the commencement date of the insurance cover for the vessel “Agape”, which appears in all related documents namely, the debit-note (exhibit P29), the cover note (exhibit P11) and the Insurance Policy (exhibit P11-A) issued by SACOS, is backdated and such a backdate is put therein simply for statistics purposes. That is not the effective date for insurance purposes. As far as SACOS is concerned, such date is put therein so that SACOS can have control of how much it underwrites for each month. Having thus testified Ms. Chetty also stated that SACOS sometimes underwrite backdating the insurance cover at the request of their clients provided there has been no loss of the subject matter of the insurance and the client acts in good faith. According to Ms. Chetty had SACOS been made aware that the “AGAPE” had been lost on 16th January 1999, it would not have backdated the cover to the 15th of January 1999. However, only in April 1999, SACOS was informed by the broker about the loss. Furthermore, she stated that if the plaintiff had informed SACOS that the vessel had been lent out to somebody prior to the cover being taken, SACOS would not have insured the vessel at all or would have issued a Policy with different conditions. On the question the interest of any bank on the subject matter of insurance, Ms. Chetty testified that normally it is the duty of the bank concerned to notify the Insurer of any such interest. Further Ms. Chetty stated in her evidence in chief that SACOS was never asked to grant cover starting from 15th January 1999. According to Ms. Chetty, as the statement of accounts maintained by SACOS, the premium was received on 2nd March 1999 and the same was refunded to the broker on 29th of February 2000. The plaintiff received the refund through the broker and impliedly accepted the cancellation of the insurance. It is also the contention of Ms. Chetty that with regard to Marine Insurance Policy there is a duty on the insured to disclose to the insurer all material facts, which may increase the risks.

According to Ms. Chetty firstly, the plaintiff did not disclose the fact to SACOS that the vessel had been lost prior to asking them to grant insurance cover; secondly, the plaintiff did not disclose the fact that the vessel had been lent to another person, a foreigner.

Mr. Andy Marie (DW2) testified in substance that on 28th December 1998 Ms. Jane Servina from the 2nd defendant company requested him to give a quotation in respect of the insurance in dispute and he provided her one. Only on 21st January 1999, he received all the documents and the confirmation from the 2nd defendant. He issued Policy to take effect only from that date. However, since the proposal form had indicated the request from the plaintiff as from 15th January 1999, SACOS issued the policy accordingly with effective date in the Policy from 15th January 1999. Further, he testified that he never confirmed over telephone to Ms, Servina that the insurance would be effected to cover the period as from 15th January 1999. According to Mr. Marie, it is the practice of SACOS in some cases, to backdate the “Insurance Policy” at the request of their clients. Mr. Marie also confirmed in his evidence in chief that SACOS at times issue “Insurance Cover” on verbal instructions. However, in the present case, SACOS did not issue any cover through the 2nd defendant for the vessel “Agape” on verbal instruction nor did Ms. Servina requested for any such cover prior to 21st January 1999. In any event, Mr. Marie testified that the “Insurance” in the instant case was cancelled and the premium was refunded.

Mr. Phillip Revera (DW3), the Managing Director of the 2nd defendant-company testified that the 2nd defendant as an Insurance broker carried out

everything in accordance with the request made and the instructions given by the plaintiff and accordingly obtained the insurance for the vessel "Agape" covering the period from 15th January 1999 to 14th January 2000. SACOS did issue a proper "Policy of Insurance" in accordance with plaintiff's request. All the procedures and formalities were properly complied with by the client, the broker and the insurer all acting in good faith. According to Mr. Revera, it is untrue and incorrect for SACOS to say that it did not receive any instruction prior to 21st January 1999. The 2nd defendant did in fact, give them the necessary documents, information, instructions and confirmation prior to the said date. On 15th January 1999, SACOS did through it Operations Manager Mr. Andy Marie - DW3 - confirm that the cover would take effect as from15th January 1999. In the circumstances, the 2nd defendant contends that it is not liable in damages to the plaintiff either in tort or contract.

Having sieved through the entire pleadings, evidence including all exhibits on record, and the submissions made by counsel on both sides, it seems to me, the following are the fundamental questions that arise for determination in this matter:

1. *What is the effective date of insurance in this matter?*

Was the plaintiff in breach of his duty of utmost good faith in obtaining the Insurance cover for his vessel "Agape"?
Was the plaintiff in breach of any of the conditions of Policy implied or otherwise so as to render it voidable by the Insurer, SACOS?

2. Is the Insurer entitled to avoid the policy for the alleged nondisclosure or false representation or misrepresentation of facts and deny the plaintiff's claim in this matter?
3. *Is the plaintiff entitled to be indemnified for the total loss of his vessel "Agape"? If so, how much?*
4. *Is the 2nd defendant, the broker in any way jointly or solely liable to compensate the plaintiff for his loss and damage?*

5. *Is the insurer liable to compensate the plaintiff for the interest payable to the Development Bank of Seychelles on the loan the plaintiff obtained from the Bank for the purchase of the said vessel?*

I will now proceed to find answers to the above questions in seriatim as they appear above, in the light of the evidence on record and the law applicable to the case on hand.

Question No: 1

As regards the issue as to ***the effective date of the Insurance in question***, it is evident that all crucial documents namely, the *debit-note* (exhibit P29), the *cover note* (exhibit P11), and the *Policy* (exhibit P11-A), which SACOS issued to the plaintiff stipulate in unequivocal terms that the p*eriod of Insurance Cover begins on 15th January 1999 and ends on 14th January 2000.* Hence, *ex facie* those documents, I find that the effective date of the insurance - in the eye of law - is the 15th January 1999, not the 21st January 1999, as claimed by SACOS in its defence. In fact, SACOS has issued the said debit-note admittedly, on 14th January 1999, that is, a week before the 21st January 1999 upon which date SACOS claims to have received the proposal and acceptance from the plaintiff and concluded the contract of insurance giving effect to it. If this version of SACOS is true and correct, then how it could issue a debit note to the plaintiff, on the 14th of January itself, even before receiving the proposal and acceptance from the plaintiff. As I see it, whatever the name one gives to the transaction that took place between SACOS and the broker on 14th of January 1999, this transaction has

obviously culminated in the issuance of a *debit note* by SACOS, which note has indeed, created contractual rights and obligations between the parties. The SACOS has issued that *debit note,* which obviously, serves the same function as an invoice indicating the amount owed by the plaintiff for the product or services it provided, which is more fully described in the *debit note* itself thus*: "Hull Insurance Policy No: MAHULL000421 for the Period of Cover from 15th January 1999 to 14th January 2000 and total sum insured Rs880, 600/-*. In passing I note, a debit note is nothing but a bill or invoice issued by one (the creditor) who has provided products and/or services to a customer (the debtor). It is not a quotation nor an offer nor an invitation to treat as 1st defendant is attempting to portray. To my mind, therefore, the date and period of insurance stipulated in the *debit note* is the "effective date and period of insurance", which constitute the inception date of the coverage for all legal intents and purposes and as such binding the parties, as all agreements lawfully concluded shall have the force of law for those who have entered into them *vide Article 1134 of the Civil Code*. In the circumstances, I hold the *effective date of insurance* in this matter is the 15th of January 1999.

Question No: 2

It is the contention of SACOS that the plaintiff was in breach of his *duty of utmost good faith* in that, he obtained the Insurance cover for his vessel "Agape" without disclosing the material facts (i) that the vessel had in fact, been lent to its previous owner Mr. Roger, a foreigner at the time the insurance was effected: and (ii) that the vessel had already been missing even before the insurance was effected. Hence, according to SACOS the "contract of insurance" is void ab initio.

It is truism that insurance contracts or policies are based on trust, *uberrima fides*. The insurer trusts the insured, the policyholder, to give precise and true details of the subject matter to be insured. This is called the principle of '*utmost good faith*'. Indeed, care should always be taken to tell the whole truth so that insurance companies can make a fair assessment of the risk, they are underwriting. Particularly, a contract of marine insurance (as is the case on hand) is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may avoided by the other party.

Undoubtedly, the plaintiff in this matter owed a duty to disclose in good faith all **material** facts and circumstances and the details pertaining to the vessel “Agape”, to SACOS at the inception of the insurance in other words at the formation of the contract. Incidentally, it is clear from a number of judicial decisions that in most jurisdictions the duty of such disclosure applies both pre-contractually and post- contractually. However, what is important here is the **materiality** of those facts and circumstances, which the plaintiff allegedly, failed to disclose at the formation of the contract in this matter. As regards the alleged nondisclosure as to the fact of lending the vessel to the previous owner for a trip to Praslin, the question now arises: *Is it a **material** fact in the given circumstance which, any reasonable insurer in the place of the plaintiff is expected to or would disclose in the normal course of events, unless the insurer specifically required that piece of information from the insured?* In my considered judgment it is not a material fact in the given circumstances, which any reasonable innocent insurer would disclose to the insurer in the normal course of events unless he or she is asked for such

information. Indeed, the materiality of a given circumstances and facts has to be tested at the time of the placing of the risk and by reference to the impact it would have on the mind of a prudent insurer. Obviously, as far as the assessment of the risk by the insurer is concerned, there cannot be any difference, whether the vessel is lent or chartered as both ventures involve identical use and consequential risk factors. Even if the plaintiff had disclosed the fact of lending the vessel to Mr. Roger for a trip to Praslin, it would not have made any impact on the mind SACOS in its assessment of the risk, at the formation of the contract.

Having said that, I note, the House of Lords in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd and Another (the 'Star Sea')* (2001) 1 Lloyd's Rep 389, considered the *duty of utmost good faith*. This duty enjoins not only the insured but also equally the insurer to disclose all material information with the highest degree of openness to each other. In his speech therein Lord Clyde stated at p.392 thus:

> "*In my view the idea of good faith in the context of the insurance contracts reflects the degree of openness required of the parties in the various stages of their relationship. It is not an absolute. The substance of the obligation which is entailed can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very high degree of openness at the stage of the formation of the contract, but there is no justification for requiring that degree necessarily to continue once the contract has been made*"

Lord Hobhouse also commented at p.401 therein thus:

> "*The courts have consistently set their face against allowing their assureds duty of good faith to be used by the insurer as an instrument for enabling the insurer himself to act in bad faith. An inevitable*

> *consequence in the post-contract situation is that the remedy of avoidance of the contract is in practical terms wholly one sided. It is a remedy of value to the insurer and … of disproportionate benefit to him; it enables him to escape retrospectively the liability to indemnify which he has previously and … validly undertaken"*

In the light of the above views of their Lordships, I find that the alleged nondisclosure by the plaintiff, of the information about the "lending of the vessel to the previous owner", at the formation of the insurance contract, is not a material fact, which would entail a duty on the plaintiff to disclose it in good faith to SACOS. I do not find any culpable nondisclosure or sinister motive or lack of openness on the part of the plaintiff in this respect at the inception of the insurance.

The second limb of the allegation is that although the vessel went missing even before the insurance was effected on the 21st January 1999, the plaintiff failed to disclose it to the insurer. On the face of this allegation, I find it untenable, since this court has already found (supra) that the effective date of insurance was not the 21st January 1999 as claimed by the insurer, but it was the 15th January, 1999, which was a Friday, whereas, the plaintiff, whom I believe, testified that only after the weekend, that is Monday the 18th January, he came to know that the vessel was not found either in Praslin or La Digue. In the circumstances, obviously the plaintiff cannot be expected to disclose something, which was not within his knowledge or power on the 15th January 1999. Certainly, the plaintiff is an ordinary reasonable man. He cannot have the foresight of a prophet and acquire foreknowledge of the future events. That being so, the question of nondisclosure does not arise at all for consideration in this respect. In the circumstances, I find and conclude that the plaintiff was not in breach of his

duty of *utmost good faith* in obtaining the Insurance cover for his vessel "Agape".

Question No: 3

The insurer has avoided the Policy alleging that the plaintiff failed to give "prompt notice" to them regarding the loss of the vessel, in breach of the conditions of the Policy (exhibit P11-A). The insurer relies upon in this respect, Clause 12.1 of the Policy, which reads thus:

> "Prompt notice shall be given to the Underwriters in the event of any occurrence which may give rise to a claim / under this insurance, and any theft or malicious damage shall also be reported promptly to the Police"

At the same time, Clause 14.1 *therein* under the head "*"DUTY OF ASSURED"* reads thus:

> "In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance"

Undisputedly the Policy Document (exhibit P11-A), which contained those conditions, was issued by the Insurer only on the 31st March, 1999 after an inordinate delay of about ten weeks from the formation of the contract and the disappearance of the vessel. Whatever had been the cause for such delay bureaucratic or otherwise, the fact remains that the insured (the plaintiff) was at first place, not given prompt notice of all the conditions contained in the Policy including the one that required the insured to give "prompt notice" *to the Underwriters,* of the occurrence that gave rise to the claim. Hence, the plaintiff as a prudent man after exhausting all possible attempts to locate the vessel in the waters of Seychelles and elsewhere and obviously, as soon as he received the "Policy Document" (exhibit P11-A), has notified the insurer of the loss of the vessel. Indeed, the plaintiff in due performance of his obligation under Clause 14. 1 (supra) has taken all such measures as

may be reasonable for the purpose of averting the loss which would be recoverable under this insurance, despite those measures were time consuming. Moreover, it is relevant to note here that the plaintiff promptly, on the 19th January 1999 has reported the occurrence of the misfortune (vide exhibit P16) to the Police. Having said that, I note the insurer also equally owes a duty of good faith to the insured in that, it should not avoid the Policy unilaterally, in circumstances where the information on which it based its decision is incorrect. ***See, Drake Insurance Plc (in provisional liquidation) v Provident Insurance Plc English Court of Appeal; Pill, Clarke and Rix LJJ. ; 17 December 2003.*** In view of all the above, I hold that *the plaintiff was not in breach of any of the conditions of Policy implied or otherwise so as to render it voidable by the Insurer, SACOS.*

Question No: 4

Against the insured, the insurer makes allegations, not only in the nature of "nondisclosure" but also of "false representation" or "misrepresentation" of facts, which are obviously, of criminal nature, and thus insurer avoids liability under the policy.

The burden of proof

Examining together the entire lines and nature of defence taken by the insurer in this matter, this Court cannot help feeling that the insurer is insinuating or to say the least, suspecting that the insured did not disclose certain material facts and also falsely misrepresented some other facts, presumably acting either as an accomplice to the disappearance of the vessel or with a sinister motive of making a false insurance claim after the loss occurred accidentally, due to a wrongful act committed either by the previous owner or by any other third party. As I see it, such insinuation or

suspicion leveled against the plaintiff requires strong evidence and also a higher standard of proof than the normal civil standard of the balance of probabilities **(vide The Ikarian Reefer [1995] 1 Lloyd's Rep 455)**. The court must be satisfied on the whole of the evidence that it is highly improbable that the vessel was lost accidentally. That is, the evidence has to be sufficient and strong enough to conclude that the accidental disappearance of the vessel "Agape" as claimed by the plaintiff was not true. Indeed, the more serious the allegation, the higher the degree of probability required and the more cogent the evidence required to overcome the likelihood of what is alleged and such burden lies on the insurer to prove it. ***See, GIC Seychelles Ltd vs. Say Bake (Seychelles) Ltd*** **Seychelles Court of Appeal Report 1983-1987 p250.** It is also relevant to note that the insured is presumed not to have been complicit unless and until the underwriter proves that he was ***(Elfie A Issaias v Marine Insurance Co Limited [1923] 15 Lloyd's Rep 186.*** However, in the present case, there is no evidence on record to reach such conclusion and the insurer has in my judgment, failed to discharge its burden in this respect For these reasons, I hold that the Insurer SACOS is not entitled to avoid the policy for the alleged nondisclosure or false representation or misrepresentation of facts and deny the plaintiff's claim in this matter.

Question No: 5

In view of all the above, undoubtedly, the plaintiff (the insured) is be indemnified and compensated by the insurer, for the total loss of his vessel "Agape" in terms of the policy of insurance in question. However, the *"document of endorsement"* (in exhibit P11) which forms part of the Insurance Policy stipulates along with other terms and conditions, that the said *Policy is subject to an excess of SR 75, 000/- in respect of total loss.* Since the sum assured as per the terms of the Policy is Rs380, 600/- the Insurer is liable to pay only Rs305, 600/- (i.e. sum assured SR 380, 600/- less excess *SR 75,*

000/-) to the plaintiff under the Hull Insurance Policy Number MAHULL000421 and so I find. 26

Question No: 6

As regards the 2nd defendant's involvement in the entire transaction, I believe Mr. Phillip Revera (DW3), the Managing Director of the 2nd defendant-company in his testimony that his company as an Insurance broker carried out everything in accordance with the request made and the instructions given by the plaintiff and accordingly obtained the insurance for the vessel "Agape" covering the period from 15th January 1999 to 14th January 2000. I also believe the version given by Ms. Jane Servina, the Marketing Manager of the 2nd defendant-company in her letter dated 28th January 2000 in exhibit P22, narrating the sequence of events that led to the issuance of the above "Insurance Policy" (Exhibit 11-A) by SACOS. In the circumstances, I find that the 2nd defendant is not either jointly or solely liable *to compensate the plaintiff for his loss and damage* either in tort or contract as it has not committed any fault or breach of contract with the plaintiff or with the 1st defendant. Hence, I hold that the plaintiff's claim against the 2nd defendant is not maintainable in this action.

Question No: 7

I will now move on to the plaintiff's claim against the insurer, in respect of the interest *on the loan he obtained from the Bank for the purchase of the vessel "Agape"*. It is axiomatic in insurance law that Insurance Policy is one of

indemnity and the liability of the insurer is to indemnify the insured to the limit of the sum assured under the policy. Needles to sat, all rights and liabilities of the parties and the claims made under the Policy are governed by the terms and conditions stipulated therein. In my view, the insurer's refusal to pay the claim of the insured will not *ipso facto,* give rise to any extra-contractual liability that is not covered by the Policy. In particular, an insurer is contractually obligated to pay only those claims that arise from the Policy. Obviously, the insurer in this matter did not indemnify the plaintiff under the Policy for any contingency pertaining to his liability to pay interest to the bank either on the repayment of the loan he availed for the purchase of the vessel or otherwise. Since the source of the insurer's liability to indemnify, its right to avoid liability and its right to dispute the plaintiff's claim are entirely contractual, the insurer cannot be held liable in tort, even when it erroneously denies coverage and refuses to pay the claim. In any event, I find that SACOS is not a party to the said loan agreement between the plaintiff and the Development Bank of Seychelles nor is it liable to indemnify the plaintiff for the interest he owes to the bank *on the loan he obtained for the purchase of the vessel "Agape"*. Hence, I hold that plaintiff's claim in this respect is not tenable either in law or on facts.

Besides, I hold that the post-contractual transactions namely, (i) the unilateral cancellation of the Policy by SACOS after the dispute arose between the parties under the policy (ii) the refund of the premium to the insurance-broker without plaintiff's knowledge pending dispute and (iii) the receipt or acceptance of that sum by the plaintiff , cannot by themselves singly or in combination constitute a valid "accord/acceptance and satisfaction" by the plaintiff to exonerate the insurer from its obligations under the Insurance Policy. According to the defence, the premium was received on 2nd March 1999 and the same was refunded to the broker on 29th of February 2000. The plaintiff received the refund through the broker. Hence, the insurer contends that the plaintiff impliedly accepted the cancellation of the insurance and the dispute settled. Now, there is no cause of action for the plaintiff to come before this Court by entering the present suit. To my mind, a defence of this nature raised by the Insurer namely, "accord and satisfaction" is an affirmative defence. It cannot be implied on guesswork. By adducing positive evidence, the insurer must prove three elements. They are:

1. A bona fide dispute had arisen between the parties as to the existence or extent of liability under the policy and both parties had the knowledge about the actual issues in dispute.
2. Subsequent to the arising of that dispute, the parties entered into an agreement under the terms of which the dispute was compromised or settled by the refund of the premium and acceptance of it by the insured, all for the purpose of settling a dispute.

The plaintiff accepted the refund in full and final settlement of his claim made under the Policy or on a waiver of all claims under the policy.

3. A performance by the parties of that agreement

Although there is evidence on record to prove element No. 1 above, there is not even one iota of evidence to prove elements Nos. 2, 3, and 4 above. In the circumstances, I find that the defence raised by the insurer as to "Implied Settlement" of the dispute based on plaintiff's acceptance of the premium refund, is not maintainable either in law or on facts. Hence, completely reject the defence in this respect.

In the final analysis, I conclude that the vessel "Agape" owned by the plaintiff went missing during the effective period of insurance cover provided by SACOS under Policy No. MAHULL000421 and the plaintiff suffered a total loss of his vessel. Consequently, I hold SACOS liable to indemnify the plaintiff for the said loss in terms of the said Insurance Policy.

In view of all the above and for reasons stated hereinbefore, I enter judgment as follows:

1. I order the 1st defendant (SACOS) to pay the sum of SR 305, 600. 00, to the plaintiff for the total loss of his vessel "Agape" insured under Hull Insurance Policy No. MAHULL000421, together with interest on the said sum at 4% per annum (the legal rate) as from the date of the plaint;
2. I dismiss the plaintiff's claim for the interest amount, which the plaintiff is liable to pay to the Development Bank of Seychelles on the loan he

obtained from the Bank for the purchase of the said vessel;

3. I dismiss the plaintiff's claim against the 2nd defendant "Philmarjan Brokerage Services Limited" ;

I order the 1st defendant to pay plaintiff the costs of this action; and

4. I order the plaintiff to pay 2nd defendant the costs of this action.

……..

D. Karunakaran

Judge

Dated this 24th day of March, 2008