

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 095 of 2024
[In the Suva High Court Action No. HBC 238 of 2006]

BETWEEN : **FIJI ISLANDS MARITIME SAFETY ADMINISTRATION**

Appellant

AND : **SULTAN MOHAMMED KHAN**

1st Respondent

THE OFFICIAL RECEIVER

2nd Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. T. Kilakila for the Appellant**
Ms. N. Choo for the 1st Respondent
Ms. S. Kapoor for the 2nd Respondent

Date of Hearing : **04 August 2025**

Date of Ruling : **07 August 2025**

RULING

[1] The appellant appealed the High Court Decision ('HCD') delivered on 31 October 2024¹ which made *inter alia* the following orders:

(a) *The Official Receiver was at fault in applying for a Vesting Order over Sultan Mohammed Khan's Vessel.*

¹ **Khan v The Official Receiver** [2024] FJHC 645; HBC 238 of 2006 (31 October 2024)

- (b) *The Official Receiver is liable to pay Sultan Mohammed Khan damages. The quantum is to be assessed.*
- (c) *FIMSA was at fault in respect of the delay in registering the change in ownership to KSC then to Sultan Mohammed Khan.*
- (d) *FIMSA is liable to pay Sultan Mohammed Khan damages. The quantum is to be assessed.*

[2] The HCD followed the earlier judgment of the Court of Appeal² which *inter alia* concluded as follows:

[37] However, this Court is not in a position to make any determination as to:

- (a) whether in the circumstances the Official Receiver was at fault in applying for a Vesting Order; and*
- (b) if it is found that the Official Receiver was at fault, whether the Official Receiver is liable to pay Sultan Khan damages (and if so, in what amount).*

[38] This Court is also not in a position to determine:

- (a) whether FIMSA was at fault in respect of the delay in registering the change of ownership to KSC then to Sultan Khan; and*
- (b) if it is found that FIMSA was at fault, whether FIMSA is liable to pay Sultan Khan damages (and, if so, in what amount).'*

[3] Therefore, the CA ordered that:

- (1) The proceeding is to be referred back to the High Court for further consideration and determination of Sultan Khan's remaining claims in the light of this Court's findings.*
- (2) The 1st respondent is to pay costs to Sultan Khan, which are summarily assessed at \$2,500.00, within 21 days hereof.*
- (3) The 2nd respondent is to pay costs to Sultan Khan, which are summarily assessed at \$2,500.00, within 21 days hereof.*

² **Khan v The Official Receiver** [2024] FJCA 42; ABU0064.2022 (29 February 2024)

- [4] The issue before me as raised by the 01st respondent as a preliminary issue is whether the HCD on the issue of liability of the appellant is final or interlocutory. The appellant has treated it to be final and filed notice of appeal. The 01st respondent argues that it is an interlocutory decision and the appellant should have sought leave of this court to appeal. The notice of appeal therefore, should be dismissed.
- [5] In terms of section 12(2)(f) of the Court of Appeal Act, no appeal shall lie from any interlocutory order or interlocutory judgment without leave of the judge or the Court of Appeal. Section 20(1)(a) empowers a judge of the Court of Appeal to give leave to appeal.
- [6] The 01st respondent's main plank of argument is based on the 'application approach' (which the 01st respondent says should apply to this case) adopted in Fiji to determine whether an order, decision or ruling is interlocutory or final³. The Supreme Court⁴ finally settled the issue beyond doubt by authoritatively stating that:

[41] In the absence of any statutory assistance to aid the courts in Fiji, this Court is of the view that the "application approach" should be adopted unless there are strong reasons in any particular case for not doing so. As a general guide and rule of thumb, when and where there is doubt if the Order is final or interlocutory, leave should be sought.'

- [7] However, it could be seen that the Supreme Court still leaves the door open for the adoption of 'order approach' if there are strong reasons in any particular case for departing from the application approach.
- [8] The appellant on the other hand submits that the High Court agreed to hear the issue of liability first and then to deal with assessment of damages, if necessary. Therefore, the appellant argues that not to treat the liability decision as final is redundant and impractical and that through the application approach the liability decision should be seen as final and not as interlocutory. Thus, no leave is required to appeal the liability decision.

³ See **Devi v Nausori Town Council** [2025] FJCA 92; ABU008.2024 (20 June 2025) for a complete discussion on this topic.

⁴ **Jivaratnam v Prasad** [2023] FJSC 11; CBV0005.2020 (28 April 2023)

[9] In my view, if the application approach is literally adopted in this case, the impugned decision has to be considered as interlocutory and not final, for if the High Court had determined that the appellant was not liable, then the matter would have come to an end whereas because it decided that the appellant was liable, the case was kept alive as the issue of quantum of damages had yet to be determined. In terms of the application approach, an order is treated as final only if the entire cause or matter is finally determined *whichever way* the Court decides the application. The question is whether the literal application of the application approach is appropriate in this instance or whether there should be a departure from that to an order approach and whether there are strong reasons for doing so. The “order approach” requires the classification of an order as interlocutory or final by reference to its effect. If it brings the proceedings to an end, it is a final order, if it does not, it is an interlocutory order. If order approach is adopted, then the liability decision in this matter finally brought the proceedings on liability to an end and the issue of liability (not the entire case) and a direct appeal lies.

[10] Both parties rely on more or less the same previous decisions of this court and the Supreme Court. The 01st respondent argues that this was not a split trial in terms of Order 33 Rule 5 of the High Court Rules and therefore, the decisions in **Goundar v. Minister for Health**⁵ and **FAI Insurances (Fiji) Ltd v Rajendra Prasad Brothers Ltd**⁶ are not applicable.

[11] The 01st respondent responds to the decision in **Denarau Corporation Ltd v Deo Construction Development Company Ltd**⁷ relied on by the appellant, saying that it too would not apply as in that case the action was commenced by originating summons (and not by writ of summons as in the current case) where Calanchini, P (as His Lordship then was) as a single judge held that the fact that damages remained to be assessed does not convert the final judgment on the originating summons into a decision on an interlocutory application and even without any assessment, the order that damages were recoverable was in itself a final order for which leave was not required.

⁵ [2008] FJCA 40; ABU0075.2006S (9 July 2008)

⁶ [2004] FJCA 62; ABU0032.2004S (12 August 2004)

⁷ [2016] FJCA 138; ABU15.2016 (28 October 2016)

- [12] Before the High Court, both parties and the judge agreed that the issue of liability would be dealt with by way of legal submissions. But, there was no suggestion by either party nor a specific order by the judge to hold separate trials. It is also a fact that there was no formal split trial ordered in this case in terms of Order 33 Rule 5 of the High Court Rules.
- [13] Thus, liability was decided on legal submissions and after the delivery of the liability decision on 31 August 2022, a trial proper was held with the oral testimony of witnesses on 22 April 2025 on assessment of damages where the judgment is now due.
- [14] One of the distinguishing features in this case is that the issue of liability was concluded only on written submissions and obviously both parties did not dispute the facts relevant to that issue but differed possibly on interpretation placed on those documents and any considerations on the law involved. I feel that both parties, though they did not formally agree on nor did the trial judge order a formal split trial, for all purposes and intentions, agreed, knew and expected the judge to deliver a final decision on liability. Because, if the judge had decided that there was no liability on the part of the appellant, that would have obviated another trial on quantum of damages. Thus, the procedure adopted consensually suited both parties and court and prejudiced no one. In my view, the fact that there was no formal order for split trial did not mean that there was no finality to the issue of liability. There was nothing more to be determined in that respect by the judge.
- [15] Secondly, the fact that the action was instituted by originating summons too, in my view, is not determinative of whether the liability decision is final or interlocutory.
- [16] Thirdly, the trial on quantum of damages has been concluded and a decision therein is now due. Once, that decision is delivered the appellant may or may not challenge it and if it decides to do so, the issue on liability and quantum of damages could be consolidated and heard together by the Full Court.
- [17] Fourthly, the impugned decision was not the result of any interim or interlocutory application before the judge. It was consequent to a consensus or agreement by both parties

for the judge to give a final decision on liability and the quantum to be determined later again as a final decision.

[18] Therefore, I see strong reasons to refrain from applying the application approach in a literal and mechanical sense or manner in this case. I prefer to apply the order approach and conclude the liability decision as final as opposed to interlocutory requiring no leave to appeal.


[19] The appellant has also sought a stay of the HCD and proceedings for quantum of damages pending the appeal. However, I find that without any determination on the quantum of damages, the HCD cannot be enforced in any meaningful way to the detriment of the appellant. On the other hand, after the trial on quantum of damages has been concluded, the High Court should not be restrained from delivering a decision on that issue. Thus, I dismiss the summons for stay.

[20] Therefore, I am not inclined to agree with the 01st respondent's preliminary objection to dismiss the appeal. However, I think that if the 01st respondent wishes to canvass this preliminary objection before the Full Court, it is free to do so. In the circumstances, I would not order costs.

Orders of the Court:

1. *01st respondent's preliminary objection is disallowed.*
2. *Appellant's summons for stay is dismissed.*
3. *No costs.*




.....
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

Maritime Safety Authority of Fiji for the Appellant
R. Patel Lawyers for the 1st Respondent
AG's Office for the 2nd Respondent