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

CIVIL APPEAL NO. ABU 089 OF 2024
[Suva High Court: HBC 364 of 2022]

BETWEEN : **MAJOR JOSEFA SAVUA**
1st Appellant

WARRANT OFFICER CLASS 1 (WO1) JONE BUADROMO
2nd Appellant

WARRANT OFFICER CLASS 1 (WO1) INOKE LIVANISIGA
3rd Appellant

SERGEANT (SGT) LIVAI BALEICOLO
4th Appellant

CORPORAL (CPL) MARIKA SALUSERE
5th Appellant

PRIVATE (PVT) SIMIONE DAU
6th Appellant

CORPORAL (CPL) LORIMA TINADRALA
7th Appellant

AND : **MINISTER FOR HOME AFFAIRS**
1st Respondent

REPUBLIC OF FIJI MILITARY FORCES
2nd Respondent

ATTORNEY GENERAL OF FIJI
3rd Respondent

Coram : Qetaki, RJA

Counsel : Mr. I. Fa for the Appellants
Ms. E. Naulumatua for the 1st and 3rd Respondents
Mr. S. Komaibaba for the 2nd Respondent

Date of Hearing : 27 August , 2025
Date of Ruling : 06 October, 2025

RULING

(A). Background

[1] On 05.04.23, Amended Writ of Summons filed by the Appellants for remuneration and allowances from 1978 – 2002. The 2nd Respondent filed an untimely Acknowledgement of Service on 01 May 2023

[2] On 03.05.23, 2nd Respondent filed Summons to Strike out the Amended Writ of Summons and Statement of Claim and served on the Appellants through their Solicitors on 17 May 2023. No Defence to the Statement of Claim had been filed.

[3] On 09.05.23, Appellants attempted to file Default Judgment against 1st – 3rd Respondents.

[4] On 07 July 2023, the Appellants filed a Summons to Strike Out the 2nd Respondent's application to Strike Out.

[5] On 25th March 2024, a Ruling was delivered on the Appellants Strike Out Summons by the Acting Master of the High Court dismissing the application.

[6] On 5th April 2024, the Appellants filed for leave to appeal the Master's Ruling in the High Court.

[7] On 11th October, 2024, the High Court delivered its judgment against the Appellants Strike Out Summons dismissing it.

[8] On 24th October, 2024 the Appellants filed a Renewed Summons Seeking Leave to appeal an interlocutory decision delivered on the 25th March 2024, with an Affidavit in Support sworn by Josefa Savua, Retired of 14 Tuvana Place, Samabula, Suva.

[9] On 14th February, 2025 the 2nd Respondent filed an Affidavit in Opposition sworn by Commander (Navy) Aisake Rabuku, Deputy Director Army Legal Services, HQ RFMF Berkley Crescent, Suva.

[10] On 07th March, 2025 the Appellants filed an Affidavit in Reply to Affidavit by Director Army Legal Sevices filed on 14th February 2025.

[11] On 21st March 2025 the 2nd Respondent filed its Written Submission, and on 07th April,2025 the Appellants filed their Written Submissions.

[12] The Appellants had sought the following Orders in their Renewed Summons, that: leave be given to the 1st - 7th Appellant to appeal the decision of the Acting Master; the decision delivered on the 25th of March 2024 Civil Action No.HBC 364 of 2022, being the substantive matter be stayed until the determination of the appeal; for enlargement of time to file and serve the Notice and Grounds of appeal, if necessary; for costs of this action be in favour of the 1st – 7th Appellants and ,any such other relief as this Honorable Court deems just.

(B). Grounds of Appeal

[13] The Application is made on the following grounds:

(i) That the Acting Master erred in law and in fact in failing to consider that the 2nd Respondent had filed its Acknowledgement of Service out of time by approximately 12 days and therefore required leave of the court to do any other act.

(ii) That the Acting Master erred in law and in fact in determining that the 2nd Defendant did not require leave pursuant to Order 12 Rule 5 of the High Court Rules 1988 to file its Summons to strike out.

(iii) That the Acting Master erred in law and in fact in determining that the 2nd Defendant having filed its Acknowledgement of Service out of time was not barred from filing any further pleadings or its Striking Out application without leave of the Court.

(iv) That the Acting Master erred in law and in fact in determining that the 2nd Respondent did not require leave of the Court to file its Summons to strike Out, filed on 03.05.23 contravening Order 18 Rule 2 of the High Court Rules 1988.

(v) That the Acting Master erred in fact and in law in failing to find that the 2nd Respondent required the leave of the Court to not file a Statement of Defence within 14 days as required by the High Court Rules 1988.

(vi) That the Acting Master erred in law and in fact in determining that Order 18 Rule 18(1) of the High Court Rules 1988 overrides the strict compliance of Order 18 Rule 2 and Order 12 Rule 5 of the High Court Rules 1988.

(vii) Any other relief, and

(viii) That the Ruling of the Acting Master is Void Ab Initio and should be Stayed and Set Aside.

(C). Summary of Ruling of High Court , per Acting Master L.K.Wickramasekara, dated 25th March 2024

[14] The Summons to Strike Out the Plaintiffs' Amended Summons and Statement of Claim by 2nd Defendant was made pursuant to Order 18 Rule 18 (1)(b) and (d), that is, the action is scandalous, frivolous and/or vexatious; and it is an abuse of the process of the court.

[15] The Plaintiffs' Summons to Strike Out the 2nd Defendant's Strike Out Summons alleged that the 2nd Defendant had failed to comply with specified parts of the High Court Rules, including not obtaining leave to file its application to Strike Out, and failing to file an Acknowledgement of Service in time, under Order 12 Rule 5(2) of the High Court Rules. The 2nd Defendant is precluded from filing the Strike Out Summons pursuant to Ordere 18 Rule 2 of the High Court Rules. The 2nd Defendant's Strike Out application is not properly before the Court and must be struck out.

[16] The 2nd Defendant opposed the application by the Plaintiffs and file an Affidavit in Opposition on 21/07/2023. (Paragraphs 1- 5 of Ruling).

[17] The Acting Master referred to the case **Veronika Mereoni v Fiji Roads Authority** HBC 199/2015 (23 October 2017) where Master Azhar explained the essence of O.18 Rule 18 in the following words:

> *"At a glance this rule gives two basic messages, and both are salutary for the interest of justice and encourage the access to justice which should not be denied by the glib use of summery procedure of pre-emptory striking out. Firstly, the power given under this rule is permissive which is indicated in the word "may" used at the beginning of this rule as opposed to mandatory. It is a*

"may do" provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not necessarily be struck out as the court can, still order for amendment. In ***Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.3)*** *[1970] Ch.506, it was held that the power given to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea. Marsack J.A giving concurring judgment of the Court of Appeal in* ***Attorney General v Halka****[1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972) held that:*

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

[18] The Acting Master summarized the Plaintiffs contentions as follows:

(a) The Amended Writ of Summons and the Statement of Claim of the Plaintiff was served on the 2nd Defendant on 05/4/2023 and 2nd Defendant only filed its Acknowledgement of Service on 01/04/2023 which was after the stipulated 14 days to file the same.

(b) As such, pursuant to Order 12 Rule 5(2) the Defendant is precluded from *"doing any other act"* without the leave of the Court.

(c) As 2nd Defendant had not obtained leave of the Court to file its Summons to Strike Out, the 2nd Defendant's application should accordingly be struck out.

(d) If the provision in Order 12 Rule 5(2) is not interpreted to the effect that the Defendant is precluded from *"doing any other act"* without the leave of the Court, there shall be no effect in Order 18 Rule 2.

[19] The Court noted that there are no case authorities in Fiji which clarifies the specific point in (d) above in law. (Paragraphs 13 and 14 of Ruling)

[20] The 2nd Defendant on the other hand argued that:

(a) Order 18 Rule 2 is only applicable in respect of filing of a Statement of Defence and does not preclude a Defendant in filing a Summons to Strike Out pursuant to Order 18 Rule 18 of the High Court Rules.

(b) That pursuant to Order 18 Rule 18 of the High Court rules, a Summons for Striking Out can be filed at any stage of the cause and relied on the case of **Charan v Narayan** [1993] HBC 038/92S; Decision 21 May 1993, where it was held that:

"where a Defendant challenges a statement of claim under Order 18, it is quite proper that the application be made before serving a defence." (Paragraph 15 of Ruling).

[21] The Plaintiffs were opposed to the argument based on **Charan's** case (supra) submitting that it is only relevant to applications made under to Order 18 Rule 18(1) (a) of the High Court Rules. (Paragraphs 16 – 17 of the High Court Rules.)

[22] The Acting Master, in paragraphs 18-24 of the Ruling stated as follows:18, 19 ,20 and 21 stated that:

"18. When reading Order 18 rule 18(1)(a), the plain meaning of the rule is clear that an application under that rule can be made "at any stage of the proceedings". This rule has not been made to be read subjected to Order 12 Rule 5 or for that matter Order 18 Rule 2. As such it is clear that the intention of the rule is to facilitate any party making and application for striking out under Order 18 Rule 18 to make such application at any stage of the proceedings irrespective of any other obligations under any rule.

*19. Although the application for striking out made in **Charan's** case(supra) has been made under Order 18 Rule 18(1)(a), it is clear when reading that decision in totality that the position held by the Court regarding striking out applications can be made at any stage of the proceedings is not only limited to an application under Order 18 Rule 18(1)(a) but to any application under Order 18 Rule 18(1).*

20. Moreover, the plain reading of Order12 Rule 5(2) of the High Court Rules, dictates that a Defendant who had failed to file the Acknowledgement within the stipulated time is barred from ***"either filing a statement of defence or do any other act later than if he had acknowledged service within that time. without leave from court. It is clear the bar is to serve a statement of defence or do any other act later than if he had acknowledged service within the time period. You cannot read the wording "any other act" in isolation from the following wordings "later than if had acknowledged service within time". So, a Defendant who had failed to acknowledge service within the time specified, is barred from doing any act (which the Rules has prescribed a time period), later than if he or she had acknowledged service within that time****.*

21. It is clear that Order 18 Rule 18 prescribes no time period to make an application, for striking out.

22. The fair trial is fundamental to the rule of law and to democracy itself. The right to fair trial applies to both criminal and civil cases, and it is absolute which cannot be limited. It requires a public hearing within a reasonable time by an independent and impartial tribunal established by law. Thus, the courts are vested with the power to strike out any such proceeding or claim which is detrimental to or delays the fair trial. Likewise, the rule of law and the natural justice require that, every person has access to the justice and has fundamental right to have their disputes determined by an independent and impartial court or tribunal.

23. Based on the above discussion on the law, it is the considered view of this Court that there is no irregularity of the 2nd Defendant's application to Strike Out filed on the 03/05/2023 and I find that the Plaintiffs' objections hold no water.

24. Accordingly, it is the conclusion of this Court that the plaintiffs' preliminary objections against the 2nd Defendant's summons filed on 03/05/2023 necessarily fails and therefore should be struck out and dismissed subject to costs.''

(Highlighting for emphasis)

(D). High Court Judgment, per Justice Senileba Waqainabete-Levaci, dated 11 October 2024

[23] On the right to appeal an interlocutory order or judgment of the Master, the learned judge referred (paragraph 15) to **Kelton Investment Limited v Civil Aviation Authority of Fiji** [1995] FJCA 14; ABU0034ds (15 July 1995) where Sir Tikaram JA explained the importance of leave for applications on appeal and citing authorities from the United Kingdom and Australia**.**

[24] The learned judge also referred (paragraph 16) to and quoted from **Rajendra Prasad Brothers Ltd v FAI Insurances (Fiji) Ltd** [2002] FJHC 220; HBC 0205r.2001s (9 August 2002) where the Appellant/Defendant appealed against the decision of Pathik J to convert an continue an Originating Summons in accordance with Order 29 Rule 8 of the High Court Rules. He concluded that the two authorities are clear that an appeal against a decision on the exercise of the Master's discretion on a practice or procedure must be granted cautiously. That in order to do so the Court must consider, two factors, namely: (1) Error of principle by the Master; and (2) Substantial injustice to the parties as a result of the decision. (Paragraph 17).

[25] Master Error of principle by: The learned judge analyzed the relevant High Court Rule, their implications and the authorities in view of Master's decision and concluded that there was no error of principle in the Master's analysis and conclusion. Paragraph 37,

> *"Therefore, I find that the decision was not wrong in principle and thus there is no proper grounds for which the Appellant/Plaintiff can seek leave to appeal."*

[26] Substantial injustice to the parties: There are no injustices suffered as the Master's decision was on a procedural matter and no decision has been made on the substantial matters before the Court. In paragraphs 40, 41 and 42 the learned judge stated:

> *"40. The issue in question deals with procedural rights. These do not affect the substantive rights of the parties provided the parties apply the necessary applications appropriately.*

41. The Court finds the decision in the appeal does not alter the substantive rights of parties or directly bring the proceedings to an end.

42. There is a pending application to Strike Out the Statement of Claim by the 2nd Defendant for which the Plaintiffs/ Appellants has the right to respond and if need be seek leave."

(E). The Law

[27] This is a Civil Case on appeal from the High Court in its appellate jurisdiction. Section 12(1) (c) an (2) (f) of the Court of Appeal Act states:

"12.-(1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being criminal proceeding, to the Court of Appeal-

(a) & (b) ……..

(c) on any ground of appeal involves a question of law only, from any decision of the High Court in the exercise of its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal."

(2) No appeal shall lie-

……

(f) Without leave of the judge of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court, except in the following cases, namely:-

(F). Appellants Case (see Appellants' Written Submissions Filed on 7 April 2025)

[28] The Appellants submit that the test on whether to grant leave to appeal an interlocutory order or judgment, is whether the appeal has any real prospect of success, if leave is granted: **Rosy Reddy v Yanktesh Permal Reddy & 6 Others**, Civil Action No. HBC 133 of 2011; Ruling of 27.10.23. (Paragraph 12-13)

O.12 r.5 (2) of High Court Rules 1988

[29] The Appellants submit that upon filing and serving its Amended Writ of Summons on 05.04.23 the 2nd Respondent was required by law to acknowledge service of the Amended Writ of Summons. The party acknowledging service shall not, unless the Court orders otherwise, be entitled to serve a defence or do any other act, later than if he had acknowledged service within that time. In this case the acknowledgement of service by the 2nd Defendant was filed 12 days out of time. They submit that the 2nd Respondent cannot file any other document without leave of the Court, pursuant to O.12 r.5 (2). (Paragraphs 16 and 17).

[30] The Appellants submit that the filing by the 2nd Defendant of the Strike Out application is an act that is done after the late filing of the Acknowledgement of Service (out of time by 26 days). As such, the 2nd Defendant's filing of the Striking Out application is prohibited by O.12 r.5 (2) of the High Court rules 1988. The Court has not granted the 2nd Respondent leave to do so, nor is there any application by the 2nd Defendant seeking leave of the Court. (Paragraph 18)

[31] The Appellants refers to paragraph 18 of the Master's Ruling on 25.03.24 and submit that the Master, had allowed the 2nd Respondent's Strike Out application to stand, despite the clear illegality. The Acting Master insisted that O12 r.5, O.18.r18 and O.18.r2 are Rules that can be read in isolation of each other but does not provide any legal basis for it. The Appellants submit that the Master at his own discretion and without legal justification gives O.18r.18 interpretation on its plain meaning, in accordance with the literal rule of statutory interpretation but does not do the same in his reading of O18.r.2 which imposes on a Defendant a mandatory condition to serve its statement of defence within 14 days.(Paragraph 20)

[32] The Appellants submit that the Master took the matter further by inserting his own words in constructing O.12r.5, which he paraphrases (last sentence in paragraph 20 of Ruling). The Appellants submit that the insertion, changes O.12 r.5 without the notice of the parties, and is fatal to the legality of his Ruling which is clearly unlawful, now void and of no effect. (Paragraphs 22 and 23)

[33] The Appellants challenge the findings of Levaci J, on the grounds that: (a) The court record show that at no point in time in the High Court proceedings had the 2nd

Respondent applied to extend time for compliance with O.12 of the High Court Rules nor has the court by its own motion granted such an order, and (b) the findings that the words "any other act" …. in O.12 r.5. (2) does not apply to a strike out application but only to pleadings is clearly wrong and contrary to the rules of statutory interpretation. (Paragarph 24 written submissions).

Acknowledgement of Service by the 2nd Respondent

[34] The Appellants submit that the 2nd Respondent was in breach of O12.r4 (a) of the High Court Rules for the late filing and non-service to the Appellants of his Acknowledgement of Service being late by 12 days, the notice was to be filed by close of business on 19.04.2023, however, it was filed on 01.05 23. The document was not served on the Appellants to date of filing of written submissions by Appellants.

[35] The Appellants submit that O.12.r5 (2) deal with the late filing of an Acknowledgement of Service, and due to its late filing and non-service on the Appellants, the 2nd Respondent is not permitted to file the Strike Out application dated 03.05.23. The 2nd Respondent was not entitled as of right to file its Summons to Strike Out. That Summons is not properly before the Court. It should be struck out. O.12r.5 states:

"(2) Except as provided by paragraph (1), nothing in these Rules or any writ or order thereunder shall be construed as precluding a defendant from acknowledging service in an action after the time limited for so doing, but if a defendant acknowledges service after that time, he or she shall not, unless the Court otherwise orders, be entitled to serve a defence or do any other act later than if he or she had acknowledged service within that time." (Underlining is for emphasis).

See paragraphs 25 to 29 of Appellants 'written submissions.

Breach of Order 18.r2(1) of the High Court Rules 1988

[36] Order 18.r.2 provides:

"2 (1) Subject to paragraph (2), a defendant who gives notice of intention to defend an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for acknowledgement

of service of the writ or after the statement of claim is served on him or her, whichever is the later." (Underlining is for emphasis).

[37] The Appellants submit that the operative word is "must", which imposes a compulsory obligation to serve a Statement of Defence within the time required by the rules:((See White Book at paragraph 18/2/1, page 264; "Stroud's Judicial Dictionary of Words and Phrases".) Failure to do so, means that the a defendant has not joined issue with the plaintiff on the pleadings and therefore the plaintiff is entitled to enter default judgment under O.19 r.2 for liquidated sum or O19.r.3 for unliquidated damages.

[38] The Appellant submits that the 2nd Respondent has not filed a defence in this matter and is in default of pleadings under O.18r.2 of High Court Rules. Whether the 2nd Defendant can avoid filing a defence within 14 days pursuant to the High Court Rule? The Appellants submit that the 2nd Defendant can do so, however, by leave of the Court. (Paragraphs 30 to 36 of Appellants' Written Submissions).

[39] The Appellants submit that, the Court's ability to grant leave to a defendant, to avoid filing a Statement of Defence within 14 days, is limited to the following circumstances; (a) where a Defendant may not desire to plead, if this is the case, then clearly, then clearly the Defendant is consenting to judgment to be entered against them; (b) where a Defendant requires the payment of security for costs on grounds that the plaintiff is out of jurisdiction ; (c) where a defendant desires to file an application to strike out under O.18 r.18 (1) (a) of High Court Rules, on the basis that the plaintiff's claim discloses no reasonable cause of action, as the case may be; or (d) where a Defendant desires to apply for particulars before filing its Statement of defence under O.18r 12(5) of the High Court Rules.

[40] The Appellant submits that the above grounds require that the Defendant must obtain the leave of the Court and in the relevant Summons, categorically state that this is an application for service of the Statement of Defence to be deferred or dispensed with. (See White Book 1988 paragraph 18/2/3)- (Paragraphs 37 and 38 of Appellants' written Submissions).

[41] The Appellants submit that the Acting Master has found that on an application under O.18.r18 (1)(b) and (c) could be made despite the mandatory requirements of O.12r 5(2) and O.18.r 2(1). They submit that the Acting Master was wrong in law as

O.18r.18(1) confers a discretion only but O.12r.5(2) and O.18r.18(2)(1) confers a mandatory requirement for compliance by the 2nd Respondent.

[42] The Appellants submit that the application of the word "may" has been discussed by the Supreme Court in **Joni Salueirogo Satala v Viliame Bouwalu** Civil Appeal No.CBV0005 of 2006S, as conferring a discretion and is not mandatory or absolute. When considering the application to Strike Out, the Court must consider whether the 2nd Respondent has complied with O.12r.5 , by seeking the leave of the Court, as it is a defaulting party by virtue of its late filing of its Acknowledgement of Service, for which O.12r.5(2) provides a sanction against.

[43] The Appellants submit that the 2nd Respondent must obtain the leave of the Court before due to its breach of the relevant Rules (O.12r.5 (2)). This rule and O.18r.18 (1) must be read in conjunction and it does not override O.12r.5. The Master did not make that distinction. (See paragraphs 39 to 49 of Appellants' Written Submissions).

[44] The Appellants submit that their position is supported by the following rules of statutory interpretation: *the literal rule; the mischief rule; the absurdity rule and the golden rule.* The Courts in this case ought to have followed the rules of statutory interpretation in determining how O.12r.5, O.18r18 and O.18r.2 are to be read.

[45] The Appellants submit that the Appellants have satisfied the requirements for leave to appeal. The test for leave to appeal was summarized succinctly by the Hon.Justice Calanchini in **Denarau Corporation Limited v Staffer & Gufherine limited** [2013] FJCA 64, where his Lordship held:

"Leave will be more readily granted when legal rights as distinct from matters of practice and procedure are involved and some injustice may be caused."

[46] In **Hunt v Peasegood** (2000) The Times, 20 October 2000), it was held:

"The court considering a request for permission is not required to analyze whether the grounds of proposed appeal will succeed, but merely whether there is a real prospect of success."

[47] The phrase "real prospect of success" was defined by Lord Woolf in **Swain v Hillman** [2001] 1 All ER 91to mean:

"a 'real 'prospect of success means that the prospect of success must be realistic rather than fanciful."

Stay of Execution

[48] The Appellants also seek a stay upon being satisfied that they have established a strong case prima facie, this Court must grant a stay. The principles governing a Stay of Execution are well settled. In Halsbury's Laws of England (41h Ed.Vol37 para 696) states:

"On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful."

[49] In **Natural Waters of Viti Ltd v Crystal Clear Mineral Waters (Fiji) Ltd ,** Civil Appeal ABU00 11.04S the Court of Appeal said as follows:

"On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgement and the need to preserve the position in case the appeal is successful."

Conclusion

[50] The Appellants submit:

(i) That the 2nd Respondent is in breach of O.18r.2 of the High Court Rules 1988, by failing to file a Defence within 14 days from the date of filing their Acknowledgement of Service. The requirement to file a Defence is mandatory and cannot be waived. If they wish to contest these proceedings it must file a Defence, otherwise the Appellants are entitled to enter judgment.

(ii) That the 2nd Respondent has filed an Acknowledgement of Service 12 days out of time and as such, it cannot do any further act without leave of the Court.Clearly,the Summons to Strike Out dated 03.05.23, filed in the High Court matter was filed without leave and therefore not properly before the Court and should be Struck out.

[51] The Appellants seek costs on an indemnity basis.

(G). 2nd Respondent's Case

The Law on Application for Leave to Appeal Interlocutory Judgments or Orders

[52] The 2nd Respondent submits that the decision of the Court of Appeal in **Kelton Investments Ltd & Another v Aviation Authority of Fiji** (supra) is often cited to express the position of the Courts with regard to inter locutory appeals and considerations for determination of an application for leave to appeal where Sir Tikaram P JA stated:

"I am mindful that Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. As far as the lower courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see ***Hubball v Everitt and Sons (Limited)*** *[1900]16 TLR 168).*

Even where leave is not required the policy of appellate courts has been to uphold interlocutory orders of the trial judge-see for example ***Ashmore v Corp of Lloyd's*** *[1992] 2 All ER 486 where a judge's decision to order trial of a preliminary issue was restored by the House of Lords……*

……

"We think it is plain from the terms of the judgment to which we have already referred that the Full Court was stating that error of law in the order does not in itself constitute substantial injustice, but it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result.''

[53] The 2nd Respondent submits that the authorities clearly state that the:

"Courts do not as a general rule encourage appeals from interlocutory Orders. The requirement for leave to appeal from interlocutory Orders is designed to reduce appeals from interlocutory Orders as much as possible. The legislature by requiring leave of the Court in order to appeal from interlocutory Orders has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave,": ***Yasin v Basic Industries Ltd*** *[2000] FJCA 17.*

[54] The 2nd Respondent submits that leave should be refused for the reasons that:

(1) The proposed appeal relates to purely matters of practice and procedure;

(2) There was no error of law; and

(3) The Ruling and refusal of leave to appeal do not and would not result in substantial injustice to the Defendant.

Matters of Practice and Procedure

[55] The 2nd Respondent submits that leave is generally not granted if the proposed appeal relates to matters of practice and procedure. The reason was aptly stated in **FAI Insurance (Fiji) Ltd v Rajendra Prasad Brothers Ltd** [2002] FJCA 17, as follows:

"It should be added that this application seeks leave to appeal against an interlocutory order concerning a matter of practice and procedure. It has been stated, time and time again, that such applications merely result in cost and delay. The present is no exception."

[56] The 2nd Respondent submits that the Courts are reluctant to entertain appeals on matters of practice and procedure, and that the application should be dismissed as the issues that are being raised by the Appellants on the proposed appeal are all matters of practice and procedure.

[57] The 2nd Respondent submits that this appeal relates to the issue, *whether an extension of time required to regularize the filing of pleadings under Order 12 Rule 5 (6) of the High Court Rules 1988, is also required where parties seek to make other interlocutory application like Striking Out under Order 18 Rule 18 of the Rules,* which is merely a procedural mater. Further, there is no exceptional circumstance that warrants the granting of leave.

Error of Law/Grounds of Appeal

[58] The 2nd Respondent submits that if the Appellant has no prospect in the proposed appeal which is deemed to fail, there is no question that leave will be refused. That in dealing with an application for leave, it is not necessary to delve into the merits of the appeal, and all that is necessary is to see if the appeal is wholly unmeritorious or

unlikely to succeed. The 2nd Respondent submits that the important point is , whether there is a serious question for adjudication as opposed it being frivolous or vexatious- see **Herbert Construction (Fiji) Ltd v FNPF** [2010] FJCA 3 (03 Feb 2010) where the Court was dealing with leave to appeal out of time.

[59] On grounds of appeal, the 2nd Respondent submits that, in paragraph 21 of the Appellants' Affidavit in Support, the Appellants admitted that the Acting Master disregarded procedural rules, and their contention are summarized in paragraph 18 of their Affidavit which states:

"18. Any Order made under Order 18 Rule 18 of the High Court Rules 1988, is a discretionary one and cannot override a mandatory requirement imposed by the High Court Rules 1988.The Respondents are not barred from filing an application to Strike Out under Order 18 Rule 18 of the High Court Rules 1988 but can only do so after obtaining leave under Order 12 Rule 5(2) and Order 18 Rule 2 of the High Court Rules 1988."

[60] The 2nd Respondent submits that paragraph 35 of the leave to appeal judgment of the High court reiterates and cements the same principles applied by Acting Master. Paragraphs 35 to 37 of said judgment states:

"35. The meaning of the rule is clear. The application to strike out as a summary process can be made at any time or at any stage of the proceedings. The Order 18 Rule 18 does not limit its application to certain types of proceedings.

36. Furthermore, I find that the term "any other act "is restrictive only to procedures for filing of pleadings, It does not limit the application for striking out, more particularly where Order 18 Rule 18 of HCR specifically provides that the application can be made at any stage of the proceedings. There is no provision limiting or restricting its application.

37.Therefore, I find that the decision was not wrong in principle and thus there is no proper grounds for which the Appellants/Plaintiffs can seek leave to appeal."

[61] The 2nd Respondent submits that the appeal will have no prospect of success if leave were to be granted.

Substantial injustice

[62] The 2nd Respondent submits that, the appeal being a procedural matter, even if the Court has made an error of law, it is not sufficient for grant of leave. The overriding consideration is whether any substantial injustice would flow from refusal of leave. On this issue, the Court of Appeal in **Australia and New Zealand Banking Group Ltd v Kelton Investments Ltd** stated:

*"The law on appeal against an interlocutory order is aptly stated by Murphy J. in the case of **Niemann v Electronic Industries Limited** (1978) VR 431.Murphy J stated: -*

*Likewise in **Perry v Smith** (1901),27 VLR 66 and the Darrel Lea Case (1969)*

VR 401, the Full Court held that leave should only be granted to appeal from an interlocutory judgment and order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that the substantial injustice could not follow. If the order is seen to be clearly wrong, this alone is not sufficient. It must be shown in addition, to affect a substantial injustice by its operations.

*It appears to me that graet emphasis therefore must lie on the issue of substantial injustice consequent on the order. Accordingly, if the effect of the order is to change substantive rights, or finally put an end to the action, so as to affect a substantial injustice if the order was wrong, it may more easily be seen that leave to appeal should be given. Indeed, this approach seems to have been adopted in the **Darrel Lea** case.*

[63] The 2nd Respondent rely on and refer to paragraphs 38 to 43 of the High Court judgment, and submit that the Plaintiff/Appellants will not be prejudiced if leave is refused as it will still have the opportunity to respond to the 2nd Respondent's Striking Out application and will have the righty to appeal.

[64] The 2nd Respondent prays that the Appellants application for leave to appeal the decision of the Honorable Master of the High Court should be dismissed with costs.

(H). Discussion/Analysis

[65] The Acting Master dismissed the Appellant's Strike Out application based on the view that there is no irregularity of the 2nd Defendant's application to Strike Out filed on

03/05/2023. I am not sitting on appeal from the Acting Master's Orders and it is not my function to review his decision. I am to decide on the Renewed Leave Application before me and will be commenting on the Orders of both the Acting Master and the learned High Court Judge-See Parts (C) and (D), above.

[66] The learned High Court Judge dismissed the Appellants application for leave on the basis that the authorities are clear that an appeal against a decision on the exercise of the Master's discretion on a practice or procedure must be granted cautiously. That in order to do so the court must consider: (1) Error of principle by the Acting Master; (2) Substantial Injustice to the parties as a result of the decision.

[67] The learned Judge held (Paragraphs 40, 41 and 42 of the judgment) that the matter deals with procedural rights and do not affect/alter the substantive rights of the parties or directly bring the proceedings to an end. There is a pending application to Strike Out the Statement of Claim by 2nd Defendant for which the Plaintiffs/Appellants have the right to respond to if need be.

[68] This renewed application for leave to appeal the interlocutory order, will be considered in the context of the substantive claim and the remedy that the Plaintiffs/Appellants have sought, and in light of the 2nd Respondent's alleged beaches of the High Court Rules pertaining to untimely acknowledgement of service and failure to file a Defence and failure to and the Appellant's right to enforce a Default Judgment Summons .(On 09.05.23, the *"Plaintiff attempts to file Default Judgment against the 1st-3rd Defendants. The same was rejected by the Registry on the basis that the 2nd Defendant had filed an application to Strike Out the Plaintiffs claim which was awaiting issuance "See* Affidavit in Support of Josefa Savua at paragraph 10 on Background). Lastly, the renewal application is considered in light of the likely effects and procedural, practical, and legal implications of the impugned order.

[69] In **Kelton Investment Ltd v Civil Aviation Authority of Fiji** (supra) referring to a ruling by Sir Tikaram P JA (Court of Appeal) , he explained the importance of leave for applications on appeal-See 2nd Respondent's Submissions, Part (G) above. His Lordship also referred to extracts taken from the written submissions made by the Appellant's counsel, various propositions and principles, from decisions in the following cases: **Niemann v Electronic Industries Ltd** [1978] VicRp 44;(1978) VR

431 at 441-2 per Murphy; **Décor Corp v Dart Industries** 104 ALR 621 at 623 lines 29-31; **Darrel Lea v Union Assurance** (169) VR 401on the principles on which leave is normally granted. These principles are:

(a)The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible;

(b) The legislature has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave;

*(c) Leave should not be granted as of course without consideration of the nature and circumstances of the particular case (per High Court in **Exparte Bucknell** [1936] HCA 67;(1936) 56 CLR 221 at 224.*

(d) Even "if an order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to effect a substantial injustice by its operation"

*(e) "We think it plain from the terms of the judgment to which we have already referred that the Full Court was stating the error of law in the order is the order does not in itself constitute substantial injustice, but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result"-**Darren Lea v Union Assurance.***

[70] These authorities confirm that appeals against interlocutory judgments or orders are discouraged by the courts; the nature and circumstances of the particular case must be considered should leave not be granted; there is a material difference between the exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. If an order is seen as clearly wrong, that alone is not sufficient, and it must be shown in addition *"to effect a substantial injustice by its operation"*. It is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result.

[71] In paragraphs 23 and 24 of the Ruling, the Acting Master stated:

"23. Based on the above discussion on the law, it is the considered view of this Court that there is no irregularity of the 2nd Defendant's application to Strike Out filed on the 03/05/2023 and I find the Plaintiffs objections holds no water.

24. Accordingly, it is the conclusion of this Court that the Plaintiff's preliminary objections against the 2nd Defendant's summons filed on 03/05/2023 necessarily fails and therefore should be struck out and dismissed subject to costs."

[72] At paragraphs 12 and 13 of the Ruling the Acting Master sets on the crux of the Plaintiff's contention – See paragraph [16] above. Paragraphs 13 to 24 of the Acting Masters Ruling is captured in Part (C) above.

[73] The 2nd Defendant had argued that:

(a) Order 18 Rule 2 is only applicable in respect of filing of a Statement of Defence and does not preclude e Defendant in filing a Summons to Strike Out pursuant to Order 18 Rule 18 of the High Court Rules.

(b) That pursuant to Order 18 Rule 18 of the High Court Rules, a Summons for Striking Out can be filed at any stage pf the cause and relied on the case **Charan v Narayan** (supra) where it was held, that (paragraph 15 of Ruling) :

"Where a Defendant challenges a statement of claim under Order 18, it is quite proper that the application be made before serving a defence."

[74] The above position (on Order 18 Rule 18) originates from the case **A-G of Duchy of Lancaster v L& N.W. RY** [1892] UK LawRp Ch 134;(1892) 3 Ch 274) and was raised in **Charan** in the context of a submission on "*whether a statement of claim discloses a reasonable cause of action should have been set down for determination as a preliminary issue"* whereby the Court stated:

*"The whole thrust of Order 18(1) (a) is to relieve a party from having to plead to a statement of claim which discloses no reasonable cause of action. A party should not be forced to plead prior to a determination being made as to whether in fact it should so plead, see **Smith v Croft No.2** (1988) 8 Ch 114."*

[75] The Acting Master noted that the Plaintiffs were opposed to the arguments associated with **Charan,** and stated:

"19. Although the application for striking out made in Charan's case (supra) has been made under Order 18 Rule (1) (a), it is clear when reading the decision in totality that

the position held by the Court regarding striking out applications can be made at any stage of the proceedings is not only limited to an application under Order 18 Rule (1)(b) but to any application under Order 18 Rule (1).”

[76] No authority was cited for the above proposition and construction of Order 18 Rule (1) (a). The facts in **Charan** and circumstances are quite different from this matter. The reason for the application in that case was that the statement of claim did not disclose a reasonable cause of action, unlike the reasons for the application to strike out in this action. In this case, it could be argued that the 2nd Defendant had looked at the Statement of Claims by the Plaintiffs and presumably, accepted that there is a reasonable cause of action. It did not challenge the absence of a reasonable cause of action in its Summons to Strike Out application.

[77] There appear also that in **Charan,** the pleadings were orderly, meaning that the Acknowledgement of Service was done in time, and the Defendants had also indicated their intention to defend the action. However, it would also appear (although not stated), there the Strike Out Summons was within the time specified in the Rules upon which the Statement of Defence has to be filed. Which also means that it is not certain whether in **Charan,** the Defendants had already been in breach or had defaulted, of the Rules on the time in which the statement of Defence is to be filed.

[78] There are areas of uncertainty and careful consideration must be given before applying **Charan's** principles to this case.

[79] The Acting Master continued with his analysis, as follows:

“20. Moreover, the plain reading of Order 12 Rule 5(2) of the High Court Rules dictates that a Defendant who had failed to file the Acknowledgement within the stipulated time is barred from “either filing a statement of defence or do any other act later than if he had acknowledged service within time, without leave from Court. It is clear the bar is to serve a statement of defence or do any other act later than if he had acknowledged service within time. “You cannot read the wording “any other act” in isolation from the following wordings “later than if he had acknowledged service within time”. So, a Defendant who had failed to acknowledge service within time specified, is barred from doing any act (which the rules has prescribed a time period), later than if he or she had acknowledged service within that time.”

21. It is clear that Order 18 Rule 18 prescribes no time period to make an application for striking out."

[80] Paragraph 20 of the Ruling raised the issue of whether there is a connection/relationship between Order 12 Rule (5) (on Late Acknowledgement of Service), and Order 18 particularly Order 18 Rule 2 of the High Court Rules (Pleadings-Service of defence).It is the Appellant's contention that if Order 12 Rule 5(2) is not interpreted to the effect that the 2nd Defendant is not precluded from *"doing any other act"*without the leave of the court, there shall be no effect in Order 18 Rule 2.This rule relates to *"serve a defence* "which presumes that a Statement of Defence has already been filed and there has been no service effected on the Plaintiff. In relation to Rule 18(2), the Appellant had indicated in the Affidavit of Josefa Savua that the Registry had rejected its documents on Default Judgment (presumably under Rule 14(1), due to the 2nd Defendants Strike Out application pending filing in the Registry.

[81] In paragraphs 13 and 14 of Ruling, the Acting Master stated:

"13. Plaintiff further argues that if the provision in Order 12 rule 5(2) is not interpreted to the effect that the defendant is precluded from "doing any other act" without the leave of the Court, there shall be no effect in Order 18 Rule 2.

14. It is however pertinent to note that there are no case authorities in Fiji which clarifies this specific point in law."

[82] The Acting Master had accepted the Respondent's opposition to **Charan's** case, adding that there has been no case authorities in Fiji which clarifies the specific point in law raised by the Appellants. Nevertheless, the Acting Master had interpreted the meaning and effect of Order 12 Rule 5(2), which interpretation is being challenged by the Appellants.

[83] There are questions around the application of the principles of law in **Charan** to this case. The interpretation given on the meaning of Order 12 Rule 5(2) is restrictive and fails to resolve the issue touching on the relationship between Order 12 Rule 5(2) and Order 18 Rule 18(2).That there has been no authority in Fiji on this point would suggest that either the facts and circumstances presented by this matter is exceptional,

or that there is a need for careful review and consideration of those provisions and related Orders and Rules of the High Court to harmonise them for clarity and consistency, and practicality.

[84] There has been not attempt to consider the substantive injustice of the operation of the Orders and the dismissal of the leave application. The Appellant was not able to file a Summons for default Judgment, and has been subjected to argue a Strike Out application on the substantive claim without the benefit of knowing the position of the 2nd Defendant vis a vis the Statement of Claim. The Summons has not been challenged for not disclosing a reasonable cause of action.

[85] Paragraph 22 of the Ruling states:

"The fair trial is fundamental to the rule of law and to democracy itself. The right to fair trial applies to both criminal and civil cases, and it is absolute which cannot be limited. It requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Thus the courts are vested with the power to strike out any such proceeding or claim which is detrimental to or delays the fair trial. Likewise, the rule of law and natural justice require that, every person has access to the justice and has fundamental right to have their dispute determined by an independent and impartial court or tribunal."

[86] It is important to emphasize that the right referred to is the entitlement of both the Appellants and the 2nd Respondent. The Appellant is alleging that the 2nd Respondent had not filed its defence in breach of the Rules of the High Court. The Appellant had tried to file a Default Summons but was refused. How could the Appellant fairly argue their case without the benefit of a Statement of Defence? The substantive claim is by the Appellants which need to be resolved in a fair trial. There are points of law and specific points on breaches by the 2nd Defendant of the relevant High Court Rules. While Order 18 Rule 18 (2) may be clear, however, given the totality of the Rules of the High Court, was it intended by the makers of the High Court Rules that Order 18 Rule (2) are operative despite any irregularity in pleadings breaching the High Court Rules, and in circumstances where the Appellants are unable to effectively enforce their right under Default Summons?

[87] A decision of the High Court could be canvassed on a ground involving a question of law only, However, a designation of a ground of appeal as a question of law by the Appellant or his pleader would not necessarily make it a question of law: Prematilaka, RJA, in **Josaia Voreqe Bainimarama** and **Sitiveni Qiliho v The State** Criminal Appeal No. AAU0019 of 2024.

[88] It is important that this court satisfies itself that the grounds of appeal urged by the Appellants contain questions of law. In order to do so, it is necessary to understand as to what a question of law it.As Prematilaka, RJA, had observed in the above case,

"[12] The appellant'counsel has placed three matters for consideration of this court at this stage in order to decide whether they are pure questions of law or not. If not, the appeal would be dismissed. If so, the appeal will proceed to the full court on those questions of law and any matters incidental thereto as identified by the court."

[89] The Court of Appeal, in a similar situation as this, in **Punja And Sons Limited and Ocean Soaps Limited v The New India Assurance Company Limited**, Civil Appeal No..ABU 115 of 2017:

"The Jurisdiction of the Court of Appeal in this matter

[10] As stated, the High Court judgment that is being challenged in this court was in respect of an appeal filed by the Appellant against the Decision of the Master. That appeal was governed by Order 55 rule 3 of the High Court Rules and was by way of rehearing. The appeal to this court is against the judgment of the High Court and has been made in terms of Section 12(1)(c) of the Court of Appeal Act. This therefore is a second-tier appeal and Section 12(1)(c) of the Court of Appeal Act provides that an appeal shall lie "on any grounds of appeal involves a question of law only, from any decision of the High Court in the exercise of its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal ".

[11] Before venturing to consider this appeal, this court therefore has to be first satisfied that the grounds of appeal urged by the Appellants contain questions of law. In order to do so, it is necessary to understand as to what a "question of law" is.

[12] In his submissions, the learned counsel for the Appellants emphasized that the learned High Court judge had observed that the matters urged by the Appellants were limited to matters of fact. He complained that the learned High Court judge had failed to appreciate that the failure on the part of the Master to properly evaluate the facts in line with the applicable law would amount to a question of law and that it was incumbent on the High Court to have gone into such matter.

[13] He had state in paragraph 25 of his written submissions that: -

> *"It is submitted the following grounds involve questions of law. They do not challenge the finding of primary facts but require evaluation of those primary facts to examine if the correct inferences have been drawn by the Master to reach his conclusion. In these circumstances this court is in as good a position as the Master to draw its own inferences from the primary facts and to come to a conclusion different from that of the Master."*

[14] In support of this position, he has also quoted Lord Donaldson MR in the case of British Telecommunication plc v Sheridan [1990] IRLR 27: -

> *"On all questions of fact, the industrial tribunal is the final and only judge……. The Employment Appeal Tribunal can indeed interfere if it is satisfied that the tribunal has misdirected itself as to the applicable law or there is no evidence to support a particular finding of fact has always been regarded as a pure question of law."*

[15] There are several other judicial precedents on this issue such as Chand v Fiji Times Ltd (2011) FJSC 2 (8 April 2011), Bulu v Housing Authority (2005) FJSC 1 (8 April2005), and Lakshman v Estate Management Services Ltd [2015] FJCA 26 (27 February 2015). In the case of Colettes Ltd v Bank of Ceylon (1982) 2 Sri Lanka Law Reports 514, the Supreme Court of Sri Lanka spelt out as to what would constitute "question of law". I wish to quote those since they are relevant to this matter. They are:

> *"(a) Inferences from the primary facts found are matters of law,*

(b) The question whether the tribunal has misdirected itself on the law or the facts or misunderstood them or has taken into account irrelevant considerations or has failed to take into account relevant considerations or has reached a conclusion which no reasonable tribunal directing itself properly on law could have reached or that it has gone fundamentally wrong in certain other respects is a question of law,

(c) Given the primary facts, the question whether the tribunal rightly exercised its discretion is a question of law,

(d) Whether the evidence is in the legal sense sufficient to support a determination of fact is a question of law,

(e) Whether there is or is not evidence to support a finding, is a question of law."

[90] The renewed leave application requires consideration of the relevant Rules of the High Court, their interpretation, interconnectedness and application to the facts and circumstances of the Plaintiffs' Claims brought against the Defendants in the High Court. The High Court Rules are related and connected/linked. The Rules need to be read with the view to achieving a common objective and purpose, that is, to ensure there is a fair trial within a reasonable time and that no party to a Civil Action/Litigation is unfairly prejudiced or have their substantive right adversely affected.

[91] The Grounds for leave to appeal are set out in Part (B) of this Ruling, and there are (7) grounds which are related and linked. It is alleged by the Appellants that the Acting Master erred in law and fact in various aspects as follows:

(i) Failing to consider the 2nd Respondent had filed its Acknowledgement of Service out of time by approximately 12 days and as such, required leave of the court to do any other act; This ground is arguable.

(ii) In determining the 2nd Defendant did not require leave pursuant to Order 12 Rule 5 of the High Court Rules 1988 to file its Summons to strike out; This ground is arguable.

(iii) In determining that the 2nd Defendant having filed its Acknowledgement of Service out of time was not barred from filing any further pleadings of its Striking out application without leave of the Court; This ground is arguable.

(iv) In determining that the 2nd Respondent did not require leave of the Court to file its Summons to strike out, filed on 03.05.23 contravening Order 18 Rule 2 of the High Court Rules 1988; This ground is arguable.

(v) In failing to find that the 2nd Respondent required the leave of the Court to not file a Statement of Defence within 14 days as required by the High Court Rule 1988; This ground is arguable.

(vi) In determining that Order 18 Rule 18(1) of the High Court Rules 1988 override the strict compliance of Order 18 Rule 18(2) and Order 12 Rule 5 of the High Court Rules 1988, and, This ground is arguable.

(vii) Lastly, that the Ruling of the Acting Master is Void Ab Initio and should be Stayed and Set Aside. This ground is arguable.

[92] The Acting Master had referred to a number of cases in coming to his decision especially in the context of paragraphs 18, 19, 20 and 21 of the Ruling.

[93] In **Veronika Malani v Fiji Roads Authority** (supra), it is observed that the rule (Order 18 Rule 18) gives two basic messages both related to the interest of justice and encourage the access to justice which should not be denied by the glib use of summary procedure of pre-emptory striking out. It will be noted that the 2nd Respondents did not base its application on Order 18 Rule 18(a), that the Appellants '*Summons discloses no reasonable cause of action "*. The Appellants Default Summons was rejected by the Registry, The Defendant had not filed a Defence to the Statement of Claim.

[94] In **Carl Zeiss Stiftung v Rayner &Keller Ltd (No.3)** (supra), it was held that the power given to strike out any pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea. In **Attorney General v Halka** (supra), Marsack J.A in giving a concurring judgment in the Court of Appeal held that

"the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised". It is important that the effect of the operation of the interlocutory Ruling be fully considered given the facts and circumstances of this case.

[95] This case at hand does not involve a defective pleading which needs to be amended. It is not a case involving an "offending plea". Here, the 2nd Respondent had filed a late Acknowledgement of Service, contrary to Order 12 Rule 5(2), the effect of which, according to the Appellants, is that the 2nd Respondent is precluded from *"doing any other act"* without the leave of the Court. The Appellants also allege that as the 2nd Respondent had not obtained leave of the Court to file its Summons to Strike Out the substantive Summons and Claims of the Appellants, the 2nd Respondent's application should accordingly be struck out. Further, the Appellants submit that if the provision in Order 12 Rule 5(2) is not interpreted to the effect that the 2nd Respondent is precluded from *"doing any other act"* without the leave of the Court, there shall be no effect in Order 18 Rule 2. The learned Acting Master had acknowledged in his judgment that there are no case authorities in Fiji which clarifies this specific point. This is best left for the Full Court to consider.

[96] The Appellants have raised various issues which are serious and leave ought to be given for the Full Court to consider them. I find that the facts, circumstances and issues are exceptional; the issues are beyond those of pleadings and procedures only; there are questions of law including questions of interpretation of the High Court Rules and their effects; they raise legal questions of importance and difficulty. Lastly, the impugned Order has effect on the substantive rights of the Appellants in its operation. The grounds have prospect of success, therefore, the Appellants application for leave to appeal the Acting Master's Orders is allowed.

(I) Stay of Execution of Ruling in Civil Action No.HBC 364 of 2022

[97] The Appellants also seek a stay of execution should leave be granted. The 2nd Respondent did not make a submission on this aspect**.** In **Halsbury's Laws of England** (41th Ed. Vol, 37 para 696) state as follows:

"Two principals have to be balanced against each other as to whether a Stay of Execution pending the appeal should be granted: first that a successful litigant should not be deprived of the fruits of this litigation, and secondly, that the appellant should not be deprived of a successful appeal."

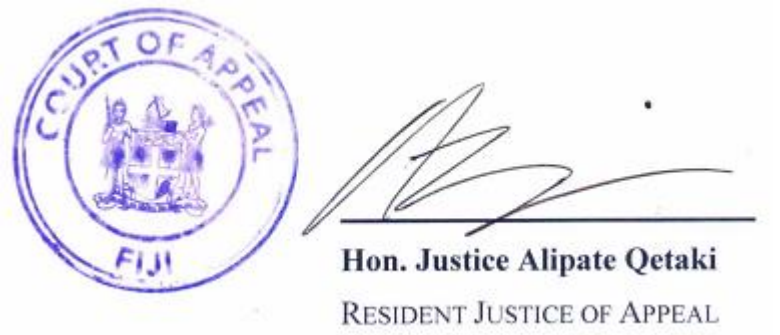
[98] This Court, in **Natural Waters of Viti Ltd** (supra) said:

"On a stay application the Court's task is carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful."

[99] I have carefully considered the issue in light of the principles, and I am inclined, given the facts and circumstances of the case, to grant a stay of execution.

Order of Court

1. *Application for leave to appeal the Interlocutory Orders of the Acting Master is granted.*
2. *Application for Stay of Execution is granted.*
3. *The 2nd Defendant to pay costs to the Appellant summarily assessed at $2,000.00 within 21 days.*



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