

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. HBG 01 of 2017

**BETWEEN:**                    **CRUZ HOLDINGS LIMITED** a limited liability company having its registered office at Level 1, 57 Marine Drive, Lami, Fiji.

**FIRST PLAINTIFF**

**AND:**                            **PDL INTERNATIONAL PTE LIMITED** a duly incorporated company of 140 Cecil Street #30-00, PIL Building, Singapore 069540, Singapore, Company Registered No. 200612037E, based in Auckland, New Zealand.

**SECOND PLAINTIFF**

**AND**                            **CONCRETE SOLUTIONS (FIJI) LIMITED** a limited liability company having its registered office at 9-11 Nukuwatu Street, Lami, Suva.

**DEFENDANT**

**BEFORE:**                    **Hon. Mr. Justice Vishwa Datt Sharma**

**COUNSELS:**                **Mr. Kapadia V.    -    for the First Plaintiff**  
**Mr. Prasad N.     -    for the Second Plaintiff**  
**Ms. Muir M.       -    for Envico Pty Limited (CCB)**  
**Ms. Qioniwasa A. -    for the Defendant**

**Date of Decision:**        **Monday 11<sup>th</sup> October 2021 @ 10am**

**DECISION**

[Summons for Leave to Appeal and stay pursuant to Section 12 (2) (f) of the Court of Appeal Act 1949; Rules 26 and 27 of the Court of Appeal Rules, Order 32 of the High Court Rules 1988 and the Inherent Jurisdiction of the Court]

## INTRODUCTION

- [1] The **Second Plaintiff, PDL International Pte Limited (PDL)** filed this Summons for **Leave to Appeal and Stay of Execution of the Ruling delivered on 08<sup>th</sup> May 2020** and sought for the following orders and directions-
- (i) It be granted to leave to appeal against the interlocutory ruling of Honourable Mr. Justice Vishwa Datt Sharma entered on the 8<sup>th</sup> day of May 2020 declining reliefs 4.0 to 7.0 sought in Amended Summons filed on 19<sup>th</sup> day of September 2018.
  - (ii) Stay of execution of the Ruling and/or of the substantive proceedings until the determination of the proposed appeal by the Fiji Court of Appeal.
  - (iii) As the Court deems just and expedient; and
  - (iv) Costs arising out of this application be in the cause.
- [2] The Second Plaintiff relies on the Affidavit of Rowan Brookes Moss.
- [3] This application is made pursuant to *section 12 (2) (f) of the Court of Appeal Act 1949; Rules 26 and 27 of the Court of Appeal Rules and Order 32 of the High Court Rules 1988* (as amended) and under the *inherent jurisdiction of the Court*.
- [4] CCB Envico Pty Limited (CCB) a cargo claimant in the limitation proceedings opposed the Second Plaintiff's **Summons seeking for Leave to Appeal the Interlocutory Ruling delivered on 8<sup>th</sup> May 2020 and Stay of Execution of the Ruling**.

### Outline of Salient Facts

- [5] The First Plaintiff is the owner of the vessel, the General Cargo Ship, MV Southern Phoenix. The Second Plaintiff was the Charterer of the said vessel at the time of its sinking in May, 2017.
- [6] The vessel in its final stages of loading in Suva Harbour and being towed away from the dock sank nearby on 6<sup>th</sup> May 2017.
- [7] The cause of the sinking of the vessel, and the liability thereof, is yet to be established. Neither the First Plaintiff nor the Second Plaintiff have admitted liability to date.
- [8] The First Plaintiff, Cruz Holdings Limited commenced this proceeding in this Court and constituted a Limitation Fund by payment into Court FJ\$1,711,690.78 inclusive of interest on 26<sup>th</sup> July, 2017 and subsequent payment of FJ\$1,882.86 on 2<sup>nd</sup> August 2017 bringing the total of the Fund to

FJ\$1,713,573.64 in respect of limitation of liability and FJ\$4,812.09 being simple interest calculated at the rate of 1.25% per annum for the period of 82 days from the date of the Casualty to the date of the constitution of the Limitation Fund.

- [9] The Second Plaintiff filed its Summons on 12<sup>th</sup> October 2017 and later filed an Amended Summons on 19<sup>th</sup> September 2018 seeking an Order to intervene and join this proceeding as a Plaintiff and to rely on the First Plaintiff's Limitation Fund rather than pay its own fund into Court.
- [10] On 18<sup>th</sup> September 2018, Orders by consent at clause 1.0, 2.0 and 3.0 as enumerated hereinabove at **paragraph 1** (i) were made and subsequently sealed by the Court.
- [11] The remaining Orders sought from 4.0 to 10.0 at paragraph 1 hereinabove were scheduled for hearing before this Court on 30<sup>th</sup> July 2019.
- [12] By consent, further Orders at 8.0 and 9.0 hereinabove were granted leaving only the prayers and/or Orders sought at clause 4.0 to 7.0 currently to be heard and determined by this Court.
- [13] This Court's Ruling of 08<sup>th</sup> May 2020 declined to make the Orders prayed for in clauses 4.0, 5.0, 6.0 and 7.0 of the Second Plaintiff's Amended Summons filed on 19<sup>th</sup> September 2018. The prayers sought therein to allow the Second Plaintiff to limit its liability by reference to the Limitation Fund already constituted by the First Plaintiff, Cruz Holdings Limited.
- [14] The Second Plaintiff in the current has now filed its **Summons for Leave to Appeal and Stay** on 29<sup>th</sup> May 2020 relying on the Affidavit deposed by Rowan Brookes Moss, annexing a proposed Notice of Appeal.
- [15] The Claimant, CCB Envico Pty Limited (subrogated to its insurer QBE), opposed clauses 4.0 to 7.0 inclusive of the Second Plaintiff's Amended Summons and now opposed the Second Plaintiff's Summons for Leave to Appeal and Stay on the seven grounds stated therein.

## **GROUND OF APPEAL**

### **Ground 1**

The learned Judge erred in law and fact in finding that the Appellant as charterer of the Ship does not have the benefit of the Limitation Fund by the operation of Part 5 of the Maritime Transport Act 2003 (the "Act") after making the following orders by consent on or about 18 September 2018:

- a. The Appellant be given leave to intervene and joined as further Plaintiff.
- b. The Appellant is an "owner" pursuant to the Act; and

- c. The Appellant is entitled to limit its liability in accordance with sections 79 and 81 of the Act.

### **Ground 2**

The Learned Judge erred in law and in fact by taking into consideration submissions and/ or matters extraneous to the Appellant's application which were not pursued by parties by referring to and relying on:

- a. Clause 33 of the Booking notes.
- b. Discussing the relevance or otherwise of English law; and
- c. Determining claims between the Appellant and the First Respondent

### **Ground 3**

The Learned Judge erred in law and in fact by finding that the Appellant relied on Section 3 of the Article 11 of the Convention on Limitation of Liability for Maritime Claims 1976 ("1976 Convention") to have the Limitation Fund established by the First Respondent as constituted by Appellant when such a reference was used during submissions to draw distinction between the 1976 Convention and Part 5 of the Act in connection with interpretation of statute based on a treaty where treaty has not been implemented into domestic law.

### **Ground 4**

The Learned Judge erred in law and in fact by finding that the Act did not contain any "legal Basis" for the Appellant's entitlement to benefit from the Limitation Fund constituted by the First Respondent without applying and/ or analysis the legal nature and effect of sections 76; 77 (b); 78 (1) (a) and (2); 79 (1) and (2); 81(1); an 82(3) of the Act.

### **Ground 5**

The Learned Judge erred in law and in fact in failing to construe, analysis and/ or make findings on the submissions advanced by the Appellant filed on or about 14 September 2018 in connection of relevant provisions of the Act namely sections 76, 77(b); 78(1) (a) and (2); 79(1) and (2); 81(1); 82(1) and 82(3) which in totality imply that one limitation fund be constituted and/ or give reasons why the said provisions did not apply in favour of the Appellant's application.

### **Ground 6**

The Learned Judge erred in law in failing to consider that the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 does provide for establishment of limitation fund by an owner to be available to a charterer under Articles 2(2) (3), (4) and 6(2), which is applicable to the Appellant.

**Ground 7**

The Learned Judge erred in law in failing to consider that Part 5 of the Act should be considered and interpreted on the basis of international comity of legal principles since the regime and principles of limitation of liability for a ship are longstanding and apply internationally in many jurisdictions and allow a charterer to rely on a limitation fund established by an owner.

And upon such further and other grounds as the Appellant may be advised in due course.

- [16] Before I dwell into the merits of the current application, it is pertinent to consider the Law relating to applications seeking for Leave to Appeal the Interlocutory Ruling and Stay of Execution of the ruling accordingly.
- [17] However, if I refuse Leave, then I need not deal with the Stay Application because there will be nothing to stay pending Appeal.

**Principles for Leave to Appeal**

- [18] Reference is made to the following principles dealing with leave to appeal and seeking stay of execution-
- [19] Section 12 (2) (f) of the Court of Appeal Act provides that no appeal shall lie from any interlocutory order or judgment of the High Court without the leave of the Judge or the Court of Appeal.
- [20] The principle that governs allowing an appeal from an interlocutory order or judgment are set out in the following cases:
- a. **Kelton Investments Ltd v Civil Aviation of Fiji** [1995] FJCA 15; ABU 0034D.95s (18 July 1995), holding that *"The Courts have thrown their weight against appeals from interlocutory orders for decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will I leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted."*
  - b. **Hussein v National Bank of Fiji** [1995] 41 FLR 130; [1995] FJ Law Rp 19 (tab 2), citing the case of **Neimann v Electronic Industries Ltd** (1978) VR 431 at 441 to the effect that *"if the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in the addition, to effect a substantial injustice by its operation"* and citing the case of **Dunstan v Simmie & Co Pty Ltd**, 1978 VR 649 at 670 to the effect that *"although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the preliminary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in Darrel Lea (Vic.) Pty Ltd v*

*Union Assurance Society of Australia Ltd. (1969) V.R. 401, substantial injustice would result from allowing the order, which it is sought to impugn, to stand."*

- c. In **Prasad v Republic of Fiji & Attorney General** (No 3) [2000] FJHC 265; [2000] 2FLR 81 Justice Gates (as he then was) dealing with an application or **leave to appeal** to set aside interlocutory order states:

*"In an application for **leave to appeal** the order to be appeals from must be seen to be clearly wrong or at least attended with sufficient doubt and causing some substantial injustice before leave will be granted see **Rogerson v. Law Society of the Northern Territory** [1993] 88 NTR 1 at 5-33; **Neimann v. Electronic Industries Ltd.** [1978 VR 451; **Nationwide News Pty. Ltd. (t/a Centralian Advocate) v. Bradshaw** (1986) 41 NTR 1.*

- d. **Shankar v FNPF Investments Limited an Anor**, Fiji Court of Appeal Civil Appeal No ABU 32 of 2016 (24 February 2017; [2017] FJCA 26 at [16], stating that *"There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of wither party. The interlocutory decision must not only by [sic] shown to be wrong but it must also be shown than an injustice would flow if the impugned decision was allowed to stand."*
- e. **Gosai v Nadi Town Council and Anor**, [2008] FJCA 1; Fiji Court of Appeal Civil Appeal No ABU 116 of 2005 (22 February 2008) , citing the case of **KR Latchan Brothers Limited** to the effect that *".....the decision or ruling of the trial judge on a interlocutory matter or any upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings."*
- f. **Rajendra Prasad Brothers Limited v FAI Insurance (Fiji) Limited**, [2002] FJHC 220; Suva High Court Civil Action No HBC 205 of 2001 (9 August 2002), holding that *"As can be seen from the wording of the said s12 (2) (f) leave will not generally be given from an interlocutory order unless the Court sees that some injustice will be done."*

## **DETERMINATION**

[21] The issues that this Court now needs to determine are the following-

- i. Whether the 2<sup>nd</sup> Plaintiff PDL International Pte Limited be granted leave to appeal the Interlocutory Ruling delivered on 8<sup>th</sup> day of May 2020;
- ii. Whether stay of execution of the Ruling and/or substantive proceedings be granted until the disposition of appeal; and
- iii. Cost be granted to the 2<sup>nd</sup> Plaintiff.

- [22] The 2<sup>nd</sup> Plaintiff, PDL filed a summons seeking leave to intervene the limitation proceedings as the 2<sup>nd</sup> Plaintiff, PDL sought to assert its rights of limitation under Part 5 of Maritime Transport Act 2013 (MTA). The summons sought orders declaring that it was entitled as owner as defined under Part 5 to limit its liability as provided by ss79 and 81.
- [23] The 2<sup>nd</sup> Plaintiff, PDL further sought orders that it was entitled to limit its liability by reference to the Limitation Fund already constituted by the 1<sup>st</sup> Plaintiff, Cruz. PDL also sought orders that claims by owners of cargo and/ or containers shipped on board the MV Southern Phoenix be directed against the limitation fund already constituted in this court, that all proceedings in any current or future actions or arbitration arising from the causality be stayed, and the Defendant and any other person be restrained from bringing any claims against the 2<sup>nd</sup> Plaintiff, PDL or the ship MV Southern Phoenix, in any other court either then the High Court of Fiji, and for the rateable distribution of the fund between the Claimants.
- [24] The 2<sup>nd</sup> Plaintiff, PDL International Pte Limited's application to be joined as a co-Plaintiff in the limitation proceedings, and its claims that it was an owner entitled to limit its liability was not opposed by Envico Pty Limited (CCB). However, CCB opposed the application by PDL to be entitled to limit under the fund constituted in the court and for the consequential orders. It said that PDL has to constitute its own limitation fund and could not rely on the fund constituted by 1<sup>st</sup> Plaintiff Cruz Holdings Limited. PDL submitted that it was entitled to limit its liability by reference to the limitation fund establish by 1<sup>st</sup> Plaintiff, Cruz Holdings Limited.
- [25] There is no provision in the 1957 International Convention actually adopted and ratified by Fiji for one party to have another party's fund treated as also being the first party's limitation fund. There is also no such provision in the Maritime Transport Act 2013 (MTA).
- [26] The argument for the 2<sup>nd</sup> Plaintiff PDL was initially primarily based on the provisions of the Convention on limitation of liability for Maritime Claims 1976.
- [27] The 1976 Convention found it necessary to adopt the 'sharing' rule as a special deeming provision, which contradicts the Second Plaintiff's assertion.
- [28] The substantive matter before the court is the issue of liability to the Claimants (mainly Cargo owners) in connection with the cargo lost and other damages caused by the sinking of the vessel, MV Sothern Phoenix, and the Interlocutory Ruling the 2<sup>nd</sup> Plaintiff PDL wishes to appeal, has not determined as of yet the substantive matter at all.
- [29] The First Plaintiff, Cruz, has not admitted liability in this matter, and this is one of the substantive issues that still has to be made out and the court has yet to determine the persons with just claims arising out of the causality and against whom those claims lay.
- [30] The ruling delivered on 08<sup>th</sup> of May 2020 had only determined the orders sought at paragraphs 4.0 to 7.0 in the Amended Summons filed on 19<sup>th</sup> September 2018. The orders sought therein were in fact

declined by this court. It will be noted at this stage of the court ruling that the court has ordered for the 2<sup>nd</sup> Plaintiff to pay the fund into court likewise the 1<sup>st</sup> Plaintiff, Cruz, pending determination of liability and the vetting of claims. This Court cannot see the rationale as to why the 2<sup>nd</sup> Plaintiff, PDL, does not intend to deposit its limitation fund into Court until the substantive matter has been dealt with by the Court. However, it is noted that the 2<sup>nd</sup> Plaintiff, PDL sought for the Court Orders for Joinder as the 2<sup>nd</sup> Plaintiff to which Envico Pte Limited (CCB) did not oppose.

- [31] The question that arises herein now, whether the 1<sup>st</sup> Plaintiffs, Cruz, limitation fund deposited into court should be used to satisfy the 2<sup>nd</sup> Plaintiffs, PDL's liability and whether it should be determined that it is the 2<sup>nd</sup> Plaintiff, PDL, who is liable to the claimants. All these impending questions and triable issues are to be decided in the hearing within the substantive matter in order to determine the liability of the party and the persons with just claims arising out of the casualty and against whom those claims lay.
- [32] The question that further arises is only if the 1<sup>st</sup> plaintiffs, Cruz, as the vessel owner is to determine liable for the sinking of the vessel, should the 1<sup>st</sup> Plaintiff's limitation fund be used to satisfy the claims filed therein.
- [33] On the other hand, upon the determination of the substantive matter, if the court finds that the 2<sup>nd</sup> Plaintiff, PDL is determined to be liable to the Claimants, whether on the basis of the contractual terms of the Bills of Lading or under the Common Law, then it will be for the 2<sup>nd</sup> Plaintiff, PDL to pay those claims to the extent of its limitation liability accordingly. Hence, it is impending deliberation and determination.
- [34] The 2<sup>nd</sup> Plaintiff's, PDL submissions to have the deeming provision of the 1976 Convention imported into Fiji Law despite Fiji's signatory to the 1957 Convention, not the 1976 Convention, has no legal basis to support it.
- [35] It was the 2<sup>nd</sup> Plaintiff PDL, who has decided to be joined as a Plaintiff and a party to the current proceedings. Therefore, it is only reasonable and appropriate to require a party seeking limitation of liability to constitute a limitation fund and pay the same into court in order to facilitate the payment of claims once liability has been determined, established and the claims vetted accordingly.
- [36] On the other hand, the 2<sup>nd</sup> Plaintiff PDL has also sought for an order for stay of the ruling delivered on 08<sup>th</sup> of May 2020. As to the current, this court has not made any order for any disbursement of any funds to any of the Claimants.
- [37] The 2<sup>nd</sup> Plaintiff PDL has been ordered by the court to deposit its limitation fund into court. This particular fund will be paid into the Chief Registrar's Interest bearing account and will remain pending in the account until this court hears the substantive matter and makes a determination as to who is entitled to the funds.
- [38] The 2<sup>nd</sup> Plaintiff PDL is understood to have claims of its own against the 1<sup>st</sup> Plaintiff, Cruz, which wishes



to pursue in this claim. It will be noted that the 1<sup>st</sup> Plaintiff, Cruz has not admitted liability in this matter and hence this is still one of the issues that has to be determined in the substantive hearing. To the current within the Interlocutory Ruling delivered on 08<sup>th</sup> May 2020, this court has just ordered the 2<sup>nd</sup> Plaintiff, PDL International Pte Limited to pay funds into this court pending the determination of liability and the vetting of claims in the substantive matter.

- [39] This court is yet to determine the question of liability. If the 2<sup>nd</sup> Plaintiff PDL is found to be liable to the Claimants and the 1<sup>st</sup> Plaintiff, Cruz is found to be liable to the 2<sup>nd</sup> Plaintiff, PDL, then the question will arise whether the Claimants be paid out of the 2<sup>nd</sup> Plaintiffs, PDL funds and the 2<sup>nd</sup> Plaintiff PDL, paid out of the 1<sup>st</sup> Plaintiff's fund? Again, this court is yet to deliberate on this issue and make a determination.
- [40] I reiterate that so far this court has only dealt with and determined the Interlocutory orders sought at clauses 4.0 to 7.0 in the amended summons filed on 19<sup>th</sup> September 2018 and this does not bring an end to the substantive matter, nor has it determined the substantive impending issues.
- [41] The 1976 Convention has not been incorporated into Fiji Law, in particular, article 11.3 was not contained in Part 5 of the Maritime Transport Act 2013 (MTA). Further, schedule to the MTA lists the "International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 (1957 Convention) and its Protocol, not the 1976 Convention" and that the 1957 Convention does not contain Article 11.3 of the 1976 Convention.
- [42] The Maritime Transport Act 2013 (MTA) did not contain any legal basis on which the 2<sup>nd</sup> Plaintiff PDL could seek the entitlement to the benefit of the 1<sup>st</sup> Plaintiffs, Cruz's Limitation fund.
- [43] The Ruling delivered on 08<sup>th</sup> of May 2020 was Interlocutory in nature and did not make any final determination of the substantive right of the 2<sup>nd</sup> Plaintiff, PDL. The substantive right of the 2<sup>nd</sup> Plaintiff, PDL is to be granted limitation of liability if it meets the criteria, and the 2<sup>nd</sup> Plaintiff, PDL has obtained such limitation of liability.
- [44] However, the Second Plaintiff, PDL International Pty Limited's contention is that the Court was correct in stating that provisions of Part 5 are derived from the 1976 Convention. Part 5 changes the limitation regime from that which applied under the 1957 Convention by enacting the key provisions of the 1976 Convention which increases the limitation amounts (Article 6) and changes the test for breaking limitation (Article 4). Those provisions reflect the international agreement reached in the 1976 Convention and there can be no other source for than the Convention. The fact that Article 11.3 of the Convention is not expressly enacted in Part 5 MTA should not prevent the Court from considering its terms in exercising its powers to make Orders in relation to the administration of a Limitation Fund. However, the Second Plaintiff on the contrary stated that the Court should have regard to the provision. Article 11.3 reflects how Limitation Fund's work and how they have worked in practice under earlier Statutory Regimes. Article 11.3 is consistent with the provisions of the 1957 Convention as regards the way in which a Fund represents the total amount of liability for all parties which are within the definition of owner.

[45] I reiterate that neither the 1976 Convention nor the provisions of Section 3 of Article 11 of 1976 Convention provisions have been incorporated into the Laws of Fiji. Schedule 1 of the Act shows that Fiji is not a Party to the 1976 Convention.

However, Fiji is a Party to the 1957 Convention which does not contain the provisions of Section 3 of Article 11. The Act does not include or incorporate the provisions of Article 11.3, nor does it contain any legal basis on which PDL can seek the entitlement to the benefit and/or protection of the Plaintiff's Limitation Fund. Therefore, under Article 13.3 a Charterer is entitled to rely on a Limitation Fund constituted by an owner.

[46] In the current case, the First Plaintiff, Cruz Holdings Limited is the owner whilst the 2<sup>nd</sup> Plaintiff PDL International Pte Ltd is the Charterer.

[47] Upon a careful perusal of the grounds of the proposed Appeal by the Second Plaintiff, PDL International Pte Ltd, the Appeal raises question of law and the interpretation of Fiji's Limitation Regime under Part 5 of the Maritime Transport Act (MTA).

[48] The Ruling delivered on 08<sup>th</sup> of May 2020 declined the Orders sought at clauses 4.0 to 7.0. It required the 2<sup>nd</sup> Plaintiff PDL International Pte Ltd to constitute its own but a separate fund altogether from that of the existing Limitation Fund already constituted by the First Plaintiff, Cruz Holdings Limited if the Second Plaintiff was to assert its limitation rights against Claimants.

[49] If I may reiterate, neither the First Plaintiff nor the Second Plaintiff have admitted liability to the proceedings. The substantive matter before this Court is still impending hearing and determination. However, to the current only the interlocutory application filed by the Second Plaintiff has been heard and determined declining the Orders that were prayed for in his Amended Summons at clauses 4.0 to 7.0 inclusive.

[50] It is only appropriate at this stage that the substantive impending application should be given priority, heard and be determined accordingly rather than giving priority to Appeal the decision of the Court delivered on 08<sup>th</sup> of May 2020 in terms of the Interlocutory Summons.

[51] In coming to the decision that the Appeal should be refused, the Court has also had reference to the High Court's decision in *Heffernan v. Byrne and Ors*. HCF Civil Action No. HBM 105 of 2007 (19 February 2008). In refusing Leave to Appeal against an Interlocutory Decision, His Lordship set out a comprehensive collocation of the authorities, referring to the case of *Kelton Investments & Anor. v Civil Aviation Authority of Fiji & Anor [1995] ABU 0034/95 (2000) 1 FLR*; *Edmund March & Ors v. Puran Sundarjee & Ors Civil Appeal ABU 0025 of 2000*; and *K R Latchan Brothers Limited v. Transport Control Board & Tui Davuilevu Buses Limited Civil Appeal No. 12 of 1994*.

His Lordship observed in *Edmund March and Ors*, this Court said-

As stated by the Judge of the Fiji Court of Appeal in *Totis Incorporated, Sport (Fiji) Limited &*

*Richard Evanson v. John Leonard Clark & John Lockwood Sellers (Civ.App.No.33 of 1996 page 15)-*

"It has long been settled law and practice that Interlocutory Orders and decisions will seldom be amenable to Appeal. Courts have repeatedly emphasised that Appeals against Interlocutory Orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting Leave only in the most exceptional circumstances.

Further, as His Lordship also noted, in *K R Latchan Brothers Limited* a full Court of Appeal said-

---the control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in *Ashmore v. Corp. of Lloyd's [1992] 2 ALL ER 486-*

Further, the decision or Ruling of the trial Judge on an Interlocutory matter or any other decision made by him in the cause of the trial should be upheld by an Appellate Court, unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings."

## CONCLUSION

### *Leave to Appeal*

[52] Bearing in mind all above and having considered the oral and written submissions together with the Affidavit evidence furnished to this Court by the parties to this proceeding, I find that the 2<sup>nd</sup> Plaintiff, PDL International Pte Limited's application seeking for **Leave to Appeal the Ruling delivered on 08<sup>th</sup> May 2020 is unsuccessful and is accordingly dismissed.**

### *Stay of Execution*

[53] Having considered that the application for Leave to Appeal is unsuccessful, application for **Stay of Execution of the Ruling and the substantive proceeding** also fails and is accordingly dismissed.

### *Costs*

[54] The application for Leave and Stay proceeded to full hearing with written submissions furnished to Court together with the lengthy oral submissions and therefore, the Claimant **CCB Envico Pty Limited** is entitled to costs summarily assessed at \$1000.

[55] The impending substantive matter to take its normal cause of action accordingly.

**ORDERS**

- i. The 2<sup>nd</sup> Plaintiff PDL International Pte Limited's, application seeking for Leave to Appeal and to Stay of this proceeding fails and is accordingly dismissed.
- ii. The 2<sup>nd</sup> Plaintiff PDL International Pte Limited to pay the Claimant CCB Envico Pty Limited a sum of \$1000 as summarily assessed costs.
- iii. The impending substantive matter to take its normal course of action.

Dated at Suva this 11th day of October, 2021.



VISHWA DATT SHARMA  
JUDGE

*Cc: Mitchell Kiel Lawyers, Suva  
Siwatibau & Sloan Barrister and Solicitors, Suva  
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