IN THE SUPREME COURT OF FIJI

[CIVIL APPELLATE JURISDICTION]

(CIVIL PETITION NO. CBV 0006 OF 2018)
(On Appeal from Court of Appeal No. ABU 11 of 2016)
(High Court HBC 244 of 2006)

BETWEEN : **SUN INSURANCE COMPANY LIMITED**

Petitioner

AND : **1. PRAVEEN LATA**
2. **MOHAMMED NASIB**
3. **SHEIK AMZAD SAHEB**

Respondents

Coram : **Jayawardena, J**
Quentin Loh, J
Madan B. Lokur, J

Counsel : **Mr. Narayan A. K. and Ms. Lata S. for the Petitioner**
Mr. Padarath M. R. for the 1st Respondent
2nd Respondent in Person
3rd Respondent in Person

Date of Hearing : **23 August 2019**

Date of Judgment : **30 August 2019**

JUDGMENT

Jayawardena, J

1. I have read the judgment of Justice Loh and I agree with the reasons and conclusions.

Madan Lokur, J

2. I have read the judgment of Justice Loh and I respectfully agree with the reasons and conclusions.

Quentin Loh, J

3. The Petitioner, which carries on the business of an approved general insurance company, seeks leave to institute an appeal as an interested party, and if granted leave to do so, asks for an extension of time of 14 days from the date of such order, to file an appeal against the decision of the Court of Appeal. The Petitioner asked for but confirmed to the Court of Appeal that it no longer pursued a stay of execution pending the appeal. In any case, once the appeal was dismissed, the stay would have been discharged.

4. These proceedings arise out of a motor accident on 2 June 2006 where a pedestrian, the Plaintiff and 1st Respondent, Ms. Praveen Lata, ("Ms Lata"), was crossing the main street in the town of Ba, using a pedestrian crossing, when she was knocked down by a truck, bearing registration number BW 132, ("the Vehicle") and dragged for a distance before the Vehicle came to a stop. The Vehicle was driven by Sheik Amzad Saheb, the 2nd Defendant and 2nd Respondent, ("Amzad"), but allegedly owned by Mohammed Nasib, the 1st Defendant and 1st Respondent, ("Nasib").

5. At the time of the accident, according to the LTA records, the Petitioner was the named insurer of the Vehicle and Nasib was the named owner of that vehicle.

6. Ms Lata filed her Writ at the Lautoka High Court on the 16 August 2006 and pursuant to section 11(2)(a) of the Motor Vehicles (Third Party Insurance) Act ("MV(TPI)A") gave notice of the same to the Petitioner on 20 August 2006. The Petitioner instructed lawyers, Messrs Mishra Prakash & Associates, who filed the Acknowledgment of Service and took on the defence of Nasib and Amzad; they filed their joint Defence on 18 December 2006.

7. During the course of their investigations, the Petitioners discovered that Nasib had sold the Vehicle to Sheik Nazil Saheb, ("Nazil"), Amzad's son, prior to the accident. Save for this fact of a sale, we do not know any other surrounding facts discovered by the Petitioner. We do not know when exactly they found this out, whether they took any statements from Nasib or other persons with knowledge of this sale and the salient facts in relation to this sale. The one person with this knowledge, the Petitioner's claims officer, Mr Naua, was subpoenaed to attend the trial, however surprisingly and most unfortunately, he or the Petitioner, decided that Mr Naua did not need to turn up at the trial and he could ignore the subpoena.

8. The Petitioner then caused their lawyers to withdraw from defending Nasib and Amzad. On 20 July 2007, Messrs Mishra Prakash & Associate gave written notice of their withdrawal to Nasib and Amzad. The ground stated in the notice was the sale of the Vehicle to Nazil. It also advised them to get their own legal representation.

9. Subsequently, for some unexplained reason, the Petitioner instructed a new set of solicitors, Messrs Suresh Maharaj & Associates to act for Nasib and Amzad. They filed their Notice of Change of Solicitors on 23 October 2007. On 30 October 2007, Ms Lata amended her Statement of Claim by averring the fact that on 9 August 2007, Amzad was convicted of careless driving and was fined $250.00. Messrs Suresh Maharaj & Associates filed an Amended Defence on behalf of Nasib and Amzad on 17 November 2007 denying that the conviction of Amzad was conclusive evidence of negligence and that the court would have to determine that issue on the evidence presented.

10. The Petitioner then filed an application to further amend the joint defence of Nasib and Amzad. In Mr Navua's supporting affidavit dated 25 August 2008, he deposed that from their further investigation report and enquiries, Nasib had sold the Vehicle to Nazil and transferred the same on 21 November 2005 and therefore at the time of the accident, Nasib had no insurable interest in the vehicle and according to the investigation report, Amzad was not the authorized driver of Nasib and therefore no liability attached or arose under their policy. Mr Naua also deposed that the proposed amendments to the defence raise a very important issue to be tried by the court and that

involved liability. He also stated that the transfer from Nasib to Nazil was outright and unconditional. Leave was granted to further amend the defence.

11. The further Amended Defence was filed on 15 September 2008. The material amendment recited that Nasib did not have an insurable interest in the Vehicle at the time of the accident as it had been sold it to Nazil on 21 November 2005 in exchange for a pair of bullocks; the transfer of the Vehicle to Nazil was outright and unconditional and Amzad was not the authorized driver of Nasib at the time of the accident. Ms Lata's claim against Nasib therefore did not disclose a reasonable cause of action, was frivolous, vexatious, scandalous and an abuse of process of the court.

12. Having filed those amendments to the Defence, Messrs Suresh Maharaj & Associates wrote letters on 15 June 2010 to Nasib and Amzad informing them that their instructions to act for them had been withdrawn because, *inter alia*, Nasib had sold the Vehicle and therefore had no insurable interest in that vehicle at the time of the accident. Messrs Suresh Maharaj & Associates then applied for and obtained a discharge from acting for Nasib and Amzad.

13. After more delays and mishaps, the matter finally went on for trial for 3 days, 26 and 27 March and 4 April 2014. Ms Lata was represented by Mr S K Ram, (her original counsel, Mr Sahu Khan having been disbarred from practice on 4 May 2011). Nasib and Amzad appeared in person and were not represented by counsel.

14. The learned Trial Judge heard the parties and their evidence. He issued his judgment on 5 August 2015. He ruled in favour of Ms Lata and awarded her some $82,059 in damages, together with interest at 6% per annum and costs of $6,000. He found Nasib and Amzad jointly and severally liable to Ms Lata for the damages and costs awarded.

15. After the judgment was handed down, Ms Lata's solicitors made a demand for payment of her judgment debt. She was met by an application by the Petitioner for a stay pending an application for leave to appeal

16. A stay was ordered and the Petitioner then made their application to the Court of Appeal seeking leave to institute an appeal as an interested party, and if granted, then for time to be extended to file a notice and grounds of appeal and an order for stay of

execution of the judgment dated 5 August 2015 in the meanwhile. It bears mentioning that none of the parties to the proceedings below appealed against the judgment at first instance.

17. In the Petitioner's supporting affidavit, the Petitioner recited the essential facts of the accident and the parties and went on to depose the following:

    (a) During their investigations, the Petitioners discovered the Vehicle had been sold by Nasib to *Amzad* (emphasis added) prior to the accident and therefore the Petitioner was not required to provide an indemnity to Nasib or Amzad nor to satisfy any judgment Ms. Lata may obtain against them;

    (b) The Petitioner's solicitors, who had been instructed to represent Nasib and Amzad had, on 15 June 2010, issued a notice on behalf of the Petitioners to them and subsequently ceased acting as solicitors for them;

    (c) Thereafter Nasib and Amzad appeared in person and undertook the conduct of their own defences; the trial proceeded and judgment was delivered by the High Court on 5 August 2015 holding, amongst other things, that both Nasib and Amzad were jointly and severally liable for Ms. Lata's injuries and that as a result of this judgment, the Petitioner may be required to provide an indemnity to Nasib and Amzad to satisfy the judgment obtained against them by Ms. Lata;

    (d) The Petitioner, which was not added as a party to the High Court action, has now become interested in the proceedings by virtue of Section 11 of the MV(TPI)A;

    (e) That if the Petitioner is given leave to be made a party and appeal the judgment it will have some impact on its liability under the Act;

    (f) That the Petitioner's position will be greatly prejudiced if the judgment is allowed to stand and it is not allowed to appeal as it may have to satisfy the judgment;

    (g) That the Petitioner was made aware of the judgment on 13 October 2015 after Ms Lata's solicitors wrote to the Petitioner directly;

(h) After becoming aware of the judgment, the Petitioner required an opinion from its solicitors and on receiving the opinion, the board of directors/management had to convene to discuss the issues and options; that the legal vacation fell during that period and it was not until 15 January 2016 that the Petitioner instructed its solicitors to file the application to the Court of Appeal;

(i) Ms. Lata will not be prejudiced by any stay of the action as she has waited since 2006 and any delay can be compensated by costs;

(j) The Petitioner's solicitors have advised that the appeal raises both novel and important questions of law.

18. Ms. Lata filed an affidavit in opposition and deposed, *inter alia*, as follows:

(a) The Petitioner had several opportunities to argue the issue that it was not required to indemnify Nasib and Amzad, but it chose not to do so;

(b) The Petitioner had participated in the proceedings and filed defences raising the issues it raises in its present application and although the trial took 9 years to complete, the Petitioner did nothing to obtain any orders to the effect that they were not required to indemnify Nasib and Amzad;

(c) The Petitioner unilaterally decided that they had no legal obligation to indemnify either Nasib or Amzad when it was clear from the evidence that any alleged transfer had not been completed; the Vehicle was insured with the Petitioner as third party insurers;

(d) The Petitioner engaged Messrs Mishra & Associates to defend Nasib and Amzad against Ms Lata's claim, they filed a defence and subsequently amended the defence on 4 April 2007 and on 20 September 2007, the Petitioner withdrew Messrs Mishra & Associates' services as counsel for Nasib and Amzad;

(e) On 25 October 2007, Messrs Suresh Maharaj & Associates filed a Notice of Change of Solicitors and came on record for Nasib and Amzad;

(f) On 9 August 2010 the Petitioner's lawyers filed a summons to withdraw on the ground that there was no liability attaching to the third party policy as the vehicle had been sold and transferred outright on 21 November 2005;

(g) On 10 February 2011, the Petitioner's lawyers acting for Nasib and Amzad filed an application to cease acting for them; this was allowed on 2 March 2011; and

(h) On 17 February 2013, Messrs AK Lawyers were appointed to act for Nasib and Amzad, they subsequently withdrew on the basis that they had filed the Notice of Change of Solicitors in error.

19. Nasib filed an affidavit opposing the Petitioner's application as it was out of time and deposing further that leave should not be granted as they were duly informed of the proceedings.

20. Amzad similarly filed an affidavit opposing the Petitioner's application and deposed that:

(a) He was the authorized driver of the Vehicle at the time of the accident;

(b) The Petitioner's claim of not being aware of the judgment is incorrect as Mr. Naua, a Claims Office with the Petitioner was subpoenaed but he chose not to appear;

(c) The Court found Nasib was the registered owner of the vehicle; and

(d) The application of the Petitioner should be dismissed.

21. The Court of Appeal, after hearing the parties and duly considering their submissions, dismissed the Petitioner's application with costs.

22. The Court of Appeal noted that none of the parties to the proceedings below had filed an appeal. This was accordingly an application by the Petitioner to add itself as a party and to appeal against the judgment. The Court of Appeal quite correctly held that pursuant to section 13 of the Court of Appeal Act (Cap 12), it had the same powers, authority and jurisdiction of the High Court and that included such power and authority

as may be prescribed by the rules of Court; this therefore included Order 15 rule 6(2) of the High Court Rules 1988.

23. The Court of Appeal noted the Petitioner's reliance on the judgment of Kay L.J. in *Re Securities Insurance Company* [1894] 2 Ch 410 to the effect that a party could, with leave of Court, be allowed to appeal against an order where he was aggrieved even though he was not a party on the record. The Court of Appeal correctly noted that this was a general proposition, *ie*., it accepted the general proposition, but whether a party was entitled to be added as a party to pursue an appeal depends on the particular circumstances of each and every case and the question was therefore whether the Petitioner should be granted leave on the facts and surrounding circumstances of this case; see para [13] of the judgment.

24. The Court of Appeal went on to examine the facts and circumstances of the case. It first noted that the Petitioner had issued a Third Party Insurance policy covering the Vehicle in question. The Petitioner had retained solicitors to appear on behalf of both Nasib and Amzad and even proceeded to file a defence. These solicitors then withdrew but were subsequently replaced by another firm of solicitors who also withdrew after some time. There was a further Notice of Change of Solicitors and that too was withdrawn. This was therefore not a case where the Petitioner was unaware of the institution of the action and they had been very much involved in the proceedings.

25. The Court of Appeal also noted that the Petitioner was not without a remedy as it could seek a declaration that the policy liability was not engaged because there had been a transfer of ownership of the Vehicle under Section 11(3) of the MV(TPI)A, provided they did so within 3 months of the institution of the action against their insured, Nasib and, in this case, the purported authorized driver under their policy.

26. It was not lost on the Court of Appeal that the Petitioner was aware of the trial taking place because their claims officer Mr. Naua had been subpoenaed to attend the trial. That was another opportunity to find out what was happening. Instead of ensuring Mr. Naua turned up in court, the Petitioner must have acquiesced in Mr. Naua ignoring the subpoena. We would add that the Petitioner could have sent a solicitor on a watching

brief or at the very least sent someone from their organization to keep them informed of what was happening during the trial

27. The Court of Appeal therefore held that instead of availing themselves of these opportunities to assert their position that their policy liability was not engaged, they only sought to address their minds after the judgment was handed down and Ms. Lata's solicitors made a demand for payment. In view of its decision on this issue, the question of an extension of time to appeal did not arise. The appeal was therefore dismissed with costs.

28. The Petitioner now makes this application for leave under section 7(3) of the Supreme Court Act 1998 read with Article 98(4) of the Constitution of Fiji and supports its application on the following grounds:

    (a) The Court of Appeal erred in law and in fact when applying the principles applicable to the Petitioner's Summons to appeal out of time as an interested party and took into account irrelevant matters which led to the dismissal of the Petitioner's application;

    (b) The Court of Appeal failed to consider, or to consider at all, the facts and principles applicable to the application;

    (c) The Court of Appeal erred in law in holding that the Petitioner did not avail themselves of section 11(3) MV(TPI)A when the provision was neither applicable nor relevant to the issues for determination and had otherwise misconstrued section 11(3) MV(TPI)A as the provision only requires an insurer to seek the relevant declaration on allegations of non-disclosure of a material fact or representation of fact which was false in a material particular;

    (d) The Court of Appeal misconstrued the proposed grounds of appeal advanced by the Petitioner and holding that they all relate "to questions of fact which have been adequately dealt with by the learned High Court Judge in his judgment and have no merit" when in fact the grounds of appeal based on the findings made by the Trial Judge were predominantly questions of law and were otherwise arguable grounds of appeal which had reasonable prospects of success;

(e) The Court of Appeal erred when it stated that the Petitioner's application had caused serious prejudice to Ms. Lata, who suffered serious injuries and who went through a period of almost ten years to get a judgment in her favour and a further period of almost three years and she still has not been able to reap the benefits of the judgment; such findings are misconceived since the duty to diligently prosecute the case lay on Ms. Lata and the subsequent three year delay was not caused by the Petitioner and more particularly that the prejudice to the Petitioner outweighs that potentially suffered by Ms. Lata and that any prejudice suffered by her could be cured by way of costs and interest accrued on the judgment sum;

(f) The Petitioner has suffered substantial and grave injustice and the issues raised present far-reaching questions of law to be determined in respect of an aggrieved parties' recourse to an Appellate Court, the principles applicable for an appeal by an interested party, leave to appeal out of time, the insurers' liability under the MV(TPI)A notwithstanding the repeal thereof, (which was only effective from 31 December 2017);

(g) There are numerous cases under the repealed legislation pending before the Courts, the Limitation Act permits a party to institute proceedings for personal injury within 3 years from the time the cause of action accrues; the Limitation Act also allows an extension of time and there are likely to be more cases covered by the repealed legislation; the Petitioner receives between 50 to 80 claims annually under its third party insurance policies and there are four other general insurers who provide cover under the repealed legislation who would be in a similar position;

(h) The subject matter of this case raises issues of substantial general interest to the administration of justice in so far as it is relevant to all cases for compensation in fatal or personal injury claims affecting the general public at large; it is also of significant interest as to the procedure of an interested and aggrieved party to appeal when he was not a party to the proceedings in the first instance; this issue is novel before this Honourable Court as there does not appear to be any decisions setting out the principles to enable this;

(i) it is also of significant interest as to the principles applicable for an application for an extension of time to appeal in cases of applications by interested and aggrieved parties;

(j) The questions of law and matters of general interest to the administration of justice involved are:

(i) whether an appellate court is required to deal with and address all the grounds of appeal before it to determine whether there are arguable grounds of appeal or otherwise reasonable prospects of success, irrespective of whether they pertain to questions of fact, law or mixed questions of fact and law?

(ii) is an appellate court obliged to give reasons for its decision fully addressing the issues required to be dealt with by it?

(iii) in what circumstances, if any, does an interested and aggrieved party, who was not a party to the proceedings, have a right to appeal from a decision in those proceedings to appeal to an appellate court?

(iv) whether an insurer is required to indemnify a named insured when the ownership and possession of the vehicle in question has passed to a third party?

(v) in what circumstances is an insurer required to have recourse to section 11(3) MV(TPI)A (repealed) when declining a claim?

(vi) what is the legal and evidentiary burden required to be satisfied in cases where an aggrieved party desires to institute an appeal to an appellate court as an interested party?

29. The Petitioner accepts, as it must, that pursuant to section 7 of the Supreme Court Act 1998, the Supreme Court "must not grant leave to appeal unless the case raises" a far reaching question of law, or a matter of great general public importance or a matter that is otherwise of substantial general interest to the administration of justice. Authoritative and settled case law has interpreted this provision as laying down the rule that leave is not granted unless the case is one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where

the case is otherwise of some public importance or of a very substantial character; the authorities for this are now legion.

30. I am of the view that none of these stringent criteria have been met, despite the able submissions of counsel for the Petitioner and for the reasons that follow this Petition must be dismissed.

31. I deal first with the group submissions that put forward the argument that the rights and ability of an aggrieved party, not being a party to the proceedings below, to have recourse to the appellate court and the principles surrounding such recourse raise novel and entail far-reaching questions of law to be determined.

32. With respect I cannot agree. There is nothing novel about this question and it is in fact covered by the High Court Rules and various authorities which I refer to below. This was answered very clearly by the Court of Appeal in its judgment at paragraphs [9] to [11] where it correctly, in my view, cited where its power to add a party to an appeal rested, *viz*., section 13 of the Court of Appeal Act (Cap 12), Order 15 Rule 6(2) and (3) of the High Court Rules 1988. The words used in Order 15 are not only of respectable lineage, having come from the English Rules of Court, it is widespread and commonly found in other Commonwealth countries which inherited the Common Law. Indeed the same number, "Order 15" and the same heading, "Causes of Action, Counterclaims and Parties" exist in the book Supreme Court Practice, commonly known as the "White Book", in other countries like Singapore, Malaysia and Hong Kong as well; (see *eg*., *Idmission Ltd v Asian Master Enterprises Ltd* [1988] 2 H.K.L.R. 614 and the reference to the "White Book" in Byrne JA's judgment in *Bubble Up investments Ltd v National MBF Finance Ltd* [1999] FJCA 38 ABU 0021d.98s (5 August 1999) at pg.3). Order 15 Rule 6 with the heading "Misjoinder and nonjoinder of parties" similarly appears in these different White Books. Another very good example is Order 14 "Summary Judgment". These provisions constitute basic court procedures for the efficient resolution of disputes and are well known in the common law context. Having said that, it bears mentioning however that the English civil procedure rules have undergone a complete overhaul and re-drafting for some time now but the legacy of their rules live on in those jurisdictions which inherited the English common law.

33. In other words, (if indeed it is at all not already clear), in language germane to the alleged issue raised as being novel and far reaching, Order 15 rule 6(2) clearly enables an applicant, not party to the proceedings, whether at the first instance or on appeal, to apply to those courts to be added as a party:

    (a) Where the applicant ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause of matter may be effectually and completely determined and adjudicated upon;

    (b) Where as between the applicant and any party to the cause of action there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the court would be just and convenient to determine between him and that party as well as between the parties to the cause or matter.

34. The words used in this sub-rule are wide and it enables an applicant, who can establish that the question or issue between one of the parties and the applicant is linked factually or otherwise to the relief or remedy claimed in the cause or matter, to join as a defendant or third party or as an intervener in the proceedings. Additionally, it must be just and/or convenient and/or necessary to add the applicant as a party and the residual discretion whether to do so or not is with the court. Further, from the opening words of Order 15 Rules 6(2), it is clear the court may impose such terms as it thinks just.

35. The Annotated High Court Act and Rules (Cap 13A) contain references to cases where Order 15 Rule 6(2)(b) was applied. We need only refer to a few examples as well as examples in other jurisdictions.

    (a) In *Bubble Up investments Ltd v National MBF Finance Ltd* [1999] FJCA 38 ABU 0021d.98s (5 August 1999), the plaintiff had obtained an order against the defendant from disposing of some chattels, vehicles and goods subject to a lease agreement it had with the defendant and the defendant had obtained an order restraining the plaintiff from obstructing, hindering or stopping the defendant from seizing those chattels, vehicles and goods; the bank was allowed to intervene in the proceedings because some of the items and chattels seized by the

defendant were held under securities to the applicant bank. The bank had not been made a party to the High Court proceedings nor was any notice of those proceedings served on it. It only became aware of the High Court action when items and chattels held under its securities were seized. It is noteworthy that Byrne JA said, of Order 15 Rule 6(2): "The scope of this rule and its predecessor has been considered in numerous cases…" Byrne JA also cited Lord Esher MR in *Byrne v Brown* (1889) Q.B.D. 657 at 666:

> "*One of the chief objects of the Judicature Acts was to secure that, wherever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence, and the main inquiry, will be the same, and the Court then has power to bring in the new parties, and to adjudicate in one proceeding upon the rights of all the parties before it."*

(b) In *Waiqele Sawmill Ltd v Mateo Sauma* [2003] HBC 34/02, Decision 13 February 2003, there was a dispute over logging rights granted by the defendant in his alleged capacity as Turaga-ni-Mataqali and purportedly as representative of Mataqali Vanalevu of Naduri Labasa to the plaintiff; the plaintiff obtained an interim injunction against Tropikboards from extracting timber under a concession granted by the Native Land Trust Board; the receivers and managers of Tropikboards were given leave to be added as a defendant to the proceedings.

(c) In *Fiji Development Bank v New India Assurance Company Limited* [2007] HBC 299/03S the plaintiff bank sued the insurer, who had paid out under a policy of insurance, which contained a 'Loss Payee' clause in favour of the plaintiff bank; the insured successfully applied to be added as a co-plaintiff or alternatively as an

interested party because it clearly had an interest in the matter as mortgagor in that it owned the lease of the native land and the building upon it which was insured. The payment it received from the insurer was allegedly for the stock, business furniture, plant and contents (which was insured for $220,000) but not the building (which was insured for $200,000). One of the defences raised by the defendant insurer was that it had obtained a full discharge upon payment of $133,000 to the insured. The learned judge held that "sound commercial sense dictates that [the applicant] *has an interest in these proceedings*" (emphasis added). If the plaintiff bank did not obtain any payment from the insurer it would affect the insured's financial position vis-à-vis its creditor bank. The learned Judge correctly stated: "It must be noted that this is a facilitative or an enabling rule and the paramount consideration is to have before the court all necessary parties. It also gives the Court enormous flexibility as to who can participate and by appropriate terms define the level of participation. The issue really boils down to this – will [the applicant's] rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any judgment which may eventually be made in this case. I think so." It is important to note that the learned Judge rightly said, as this involved an indemnity policy, the presence of the owner of the property would assist the court should the value of the property become an issue as it was very likely to do so. The applicant owner would then be able to give the relevant evidence. The learned Judge added the insured as "an interested party with liberty given to it that if the plaintiff fails to bring in satisfactory evidence about the value of the building, then it could do so. It is also given liberty to cross-examine the [defendant insurer's] witnesses relating to this aspect with leave of court" and the applicant insured was also given liberty to bring in evidence relating to the circumstances in which the fire occurred and to cross-examine the insurer's witnesses with the leave of the court.

(d) In *Fiji Medical Association v Ramon Fermin Angco & Fiji Medical Council* [1997] ABU 0041/97S, 7 November 1997, the Fiji Medical Association, an association established under the Medical and Dental Practitioners Act (Cap 225), was granted leave to appeal against the decision of Scott J who heard and ruled on the disputes

between the respondents, a Philippine doctor Ramon F. Angco and the Fiji Medical Council over registration and the right to practice in Fiji. Scott J ruled, after recording his dissatisfaction over how both parties had presented their cases, since it was not disputed that Dr. Angco was registered under Part II of the medical register, there was no statutory authority to suspend his registration and therefore he remained registered to practice generally. The Court of Appeal granted leave to the Fiji Medical Association, being an association established under the foregoing Act with the objects of promoting the welfare and maintaining the integrity and status of the medical profession and protecting and assisting the public and medical profession in all matter touching, ancillary or incidental to the practice of medicine, to appeal against the decision of Scott J. As matters of considerable public importance were in issue in the proceedings below and in respect of which the appellant had a strong interest, the Fiji Medical Association was given leave to appeal against the decision of Scott J and to adduce additional evidence.

36. A trawl through other Commonwealth countries will throw up many more examples. I need only cite the Singapore White Book, (Singapore Civil Procedures 2018 Vol 1, (Sweet & Maxwell, 2018) at para. 15/6/13, which cites *Gurtner v Circuit* [1968] 2 All E.R. 328 CA (Eng) for the rule that the right to intervene and be added as a party exists where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly; the effect of which is to include any case in which the intervener is directly affected not only in his legal rights but also in his pocket. Thus the Motor Insurer's Bureau will be allowed to be added in an action arising out of a road traffic accident, since any judgment in the action can be legally, though indirectly, enforceable against them. A surety who would be directly affected by the determination of the question whether a payment made to a creditor is a fraudulent preference ought to be made a party to the proceedings, *Re Indenden (A Bankrupt)* [1970] 1 W.L.R. 1015.

37. There is, accordingly, no novel or far reaching questions of law to be determined in this first group of issues, nor is there any matter of great general public importance or matter that is of substantial general interest to the administration of justice.

38. I now turn to the second group of submissions in relation to the MV(TPI)A and in particular section 11(3), the insurer's liability under the MV(TPI)A and their constituting substantial general interest to the administration of justice as it is relevant to all cases for compensation in fatal or personal injury claims. The Petitioner submits it is of interest to the general public at large as there are numerous cases under this piece of, (albeit now repealed), legislation. The Petitioner states it is has some 50 to 80 claims annually under its third party insurance policies and there are four other general insurers in the same position.

39. Having considered Mr. Narayan's valiant submissions, with respect, I find that the Petitioner has not met the stringent criteria to obtain leave to appeal on these grounds.

40. The provisions of the MV(TPI)A are of considerable antiquity, being based on the United Kingdom's Road Traffic Act 1930. This was a social piece of legislation to ensure that victims of road accidents, who suffered death or personal injury arising from the negligent driving or use of the ever increasing number of motor vehicles, (and who were also travelling at ever faster speeds), received compensation through the imposition of compulsory third party insurance cover for motor vehicle. The roots of section 4(1) of the MV(TPI)A can be clearly seen in section 31 of the UK Road Traffic Act 1930:

> *"It shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on the road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act."*

Many other Commonwealth countries which inherited the Common Law have similar or equivalent legislation to the MV(TPI)A. The purpose behind this provision is also found in similarly worded provisions in these countries.

41. The concept behind section 11(1) MV(TPI)A is also commonly found in equivalent or similar statutes in these countries. The social concept embodied in this provision is clear. Even if insurer is entitled to avoid liability or cancel their policy for non-disclosure, provided notice of the action has been given by the injured plaintiff to the insurer as required under section 11(2)(a), the insurer has to make payment under the judgment; but it can subsequently recover that sum from their insured. The colloquial expression is 'pay first, collect from the insured later.' There is nothing novel about this provision. Section 11(1) provides in plain and clear language that if the victim of a road accident obtains a judgment against a person insured by the motor policy, then, notwithstanding that the insurer *may be entitled to avoid or cancel*, (*ie*, the right to do so may have arisen but avoidance or cancellation has yet to occur), or may have avoided or cancelled the policy, (*ie*., the avoidance or cancellation has already taken place), the insurer *shall* (*ie*., not "may") pay the victim or persons entitled to the benefit of that judgment any sum payable thereunder, including interest and costs if any.

42. The Court of Appeal correctly held that an insurer need not make a payment under section 11 if upon receiving due notice under section 11(2)(a), it avails itself of the procedure in section 11(3). The insurer has to commence an action before or within 3 months after the commencement of proceedings in which the judgment was given, seeking a declaration that *apart from any provision in the policy*, the insurer is entitled to avoid the policy on the ground that it was obtained by the non-disclosure of material fact or by a representation of a fact which is false in a material particular or if the company has avoided the policy on the ground that it was entitled to do so apart from any provision contained in it; provided of course it complies with the procedural steps in the provision to section 11(3) which does not arise on the facts here.

43. The Policy in this case does not contain any warranty or covenant for the insured to inform the insurer if there is a change in any material fact or circumstance. It does contain a "NOTE" under which it states, *inter alia*, that: "Where there is a sale of

change of possession of the motor vehicle from one person to another, each such person must forthwith inform the Insurer and this policy and certificate should be forwarded to the Insurer for endorsement or replacement." This is not sufficiently or clearly worded as a continuing obligation and in any event, the certificate should be forwarded to the insurer for "endorsement or replacement". It does not contemplate cancellation as one would expect if there is a loss of insurable interest in the subject matter of the insurance policy. This note seems to contemplate the change of insured which is predicated on the new owner wishing to continue to insure with the insurer.

44. The Petitioner submits that section 11(3) only applied to insurers who are attempting to avoid the policy on the grounds of non-disclosure of material facts or a representation of fact that was false in a material particular and therefore did not apply to them. In their case, the policy holder sold his vehicle to someone else and thereby lost his insurable interest. Upon the loss of his insurable interest, the policy "lapsed", citing *Govind Sami v Dominion Insurance Limited* [2003] HBC0173 of 2003L.

45. Section 11(3) MV(TPI)A allows an insurer to avoid the compulsory payment imposed in section 11(1) as it says: "No sum shall be payable by an approved insurance company under the provisions of *this section*.." (emphasis added). It must be strictly followed in terms of timelines and conditions imposed in the subsection and its proviso. Then, apart from any provision contained in the policy, the first two instances where this avoidance is available occurs where the insurer is entitled to avoid the policy on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in a material particular.

46. However the Petitioner's submissions do not cover the third instance, *viz*., where the company has avoided the policy on the ground that it was entitled to do so apart from any provision contained in it. This is something the Petitioner has done as noted above, twice, through its solicitors' notices and the amending of the defence and withdrawing representation in court. The Court of Appeal was correct in its judgment that the Petitioner could have relied on section 11(3) because *ex facie*, the Petitioner could have or have avoided the policy on the ground that Nasib had "sold" the Vehicle to Nazil and no longer had any insurable interest in the vehicle. It should be noted that the

Petitioner has *not* said that it could not because of the timing as to when it discovered the "sale" or for any other reason. As noted above, the Petitioner has not informed the court as to when it discovered the Vehicle was "sold" by Nasib to Nazil nor as to what exactly it did find out about this transaction.

47. This brings me to the next and related point. The Petitioner misses the point of the Court of Appeal's reasoning. As discussed above, whilst the general principle of intervention by a non-party to appeal is not disputed, the question remains, under the broad discretion conferred upon the Court or Court of Appeal, as to whether it will be just and convenient to do so *in the circumstances of **this** case*. The Court of Appeal did not see this case, correctly in our view, as one where it was just and convenient or even necessary to give leave to the Petitioner to appeal.

48. The Petitioner's arguments are underpinned by the fact of an unconditional and completed sale of the Vehicle from Nasib to Nazil. However that was not what the Trial Judge found. He found that "[t]he truck was always owned by Nasib" at para. [71] of his judgment. Nasib did intend to sell the Vehicle to Nazil, he did sign the LTA transfer form before a Justice of the Peace and handed over the Vehicle and keys to Nazil who was to lodge the transfer form. However the consideration for the sale, the two bullocks were not received by Nasib. Further, although this did not appear in the judgment, from a perusal of the Notes of Evidence of the trial there was considerable controversy surrounding the alleged fact that Nasib went down to the LTA to pay the "wheel tax" for the Vehicle on 27 September 2006 as apparently noted in the LTA Payment Receipt. This was just over 10 months after the date of the "sale" date, 21 November 2005, in the LTA Transfer Form. The Trial Judge concluded, at para. [75], that there may have been some arrangement for the purchase of the Vehicle but the transfer was not finalized and executed. If that finding cannot be overturned, as it cannot and it is far too late to attempt do so, it is perfectly possible for Nasib to have retained ownership whilst payment was still outstanding and by handing over the vehicle and its keys to Nazil or Amzad, that Amzad was therefore an authorized driver.

49. I pause to note that with respect the learned Trial Judge made an error *in framing the issue* in para. [70]: "But, as to whether the first defendant ("Nasib") was the owner of

the vehicle and therefore, vicariously liable also for Amzad's negligence, is the question in this case." This was not a correct framing of the issue as there was no evidence of any master-servant or employer-employee relationship as between Nasib and Amzad or Nazil to give rise to vicarious liability. However nothing turns on this. The learned Trial Judge's important finding of fact is that at para.75.

50. The Notes of Evidence at the trial are quite garbled. The parties were not represented and when one litigant-in-person attempts to cross-examine another litigant-in-person, the evidence becomes quite incomprehensible. There were so many facts alleged, counter-alleged and they were not properly probed, followed-up or tested. At some point Amzad said the Vehicle was "sold" after the accident had happened, he was allowed to drive the Vehicle and could take his time to pay, the consideration was not two bullocks but a car and so on. The key facts surrounding the sale were hopelessly tangled. The point made by the Court of Appeal was exactly on point. If the insurers had not ceased participating at the trial, the cross-examination would have progressed properly with facts being ascertained and nailed down. In the event none of that happened.

51. The point of law argued by the Petitioner cannot get off the ground if the Trial Judge's findings of fact at para. [71] to, and especially, para. [75] still stand, *viz*., there may have been some arrangement for the purchase of the Vehicle, the transfer was not finalized and executed, *ie*., there was no transfer of title of the Vehicle. It is clear in that Nasib was still the owner of the Vehicle and Amzad was driving the Vehicle with Nasib's permission because Nasib said he handed over the keys and the vehicle.

52. I can now turn to the next set of submissions raised by the Petitioner – there was no delay, Ms. Lata was responsible for the many delays and any prejudice can be compensated by the award of interest and costs.

53. There can be little controversy that the cases in Fiji (and indeed elsewhere in the Common Law world) lay down the following tests, (see *eg*., *Gregory Clark v Zip Fiji* Civil Appeal ABU 0003 of 2014, 5 December 2014, *Kumar v State* [2012] F.J.S.C. 17), that have to be satisfied before leave is granted to appeal out of time:

(a) The length of the delay;

(b) The reason for the delay;

(c) The chances of the appeal succeeding, (*ie*., the merits), if time for appealing is extended; and

(d) The degree of prejudice to the would-be respondent if the application is granted.

54. The Petitioner fails to satisfy all four tests. The length of the delay, some 6 months, taken with the reason for the delay, (having to get legal advice on the trial judgment, consideration by the Board of Directors/management of the advice and deciding to appeal) is, in my view, inexcusable. The Petitioner was aware of the action brought by Ms. Lata from 20 August 2006 when notice thereof was served on them. As the Court of Appeal correctly pointed out, the Petitioner retained counsel for both Nasib (owner) and Amzad (driver). These solicitors participated in the proceedings from the start, filing defences, amending the defence, then discharging themselves from futher acting, then having another set of solicitors represent Nasib and Amzad, further amending the defence right though to 15 August 2010. Two Notices of withdrawal of representation and the grounds therefor were sent by the Petitioner; they were dated 20 July 2007 and 15 June 2010. As noted above, they knew of the trial because Mr. Naua was subpoenaed to give evidence. The plain truth is that the Petitioner allowed matters to go by default. They did not intervene under Order 15 Rule 6(2), they did not send anyone down on a watching brief and they must have acquiesced at the very least in allowing Mr. Naua to ignore the subpoena. It is far too late in the day for them to say that judgment, handed down on the 5 August 2015, would cause them great prejudice if it stood uncorrected. It was not only 6 months delay, in reality, the Petitioner knew about the action by Ms. Lata from 20 August 2006 but allowed matters to go by default as it were on their part.

55. As stated above, the Petitioner cannot succeed without overturning the findings of fact of the Trial Judge. It is far too late at this stage to re-call and re-examine witnesses. On the evidence as it stands, the prospects of an appeal are in the doomed to fail category.

56. As for prejudice to the Respondent, I find the Petitioner's submissions that Ms. Lata did not prosecute her claim with diligence, that she can be compensated by interest and costs and that these do not outweigh the prejudice caused to the Petitioner, to be candid, quite distasteful. The Petitioner's counsel, quite rightly in my view, did not articulate this point before us. The fact is that Ms. Lata found it a challenge to pay for lawyers to prosecute her case. She is a cook and a lay person who suffered severe injuries through absolutely no fault of her own. She has still not received a cent in compensation. The Petitioner's lawyers also contributed to the delays in acting for Nasib and Amzad and then discharging themselves. Today it is more than 13 years after Ms. Lata was hit by the Vehicle at a pedestrian crossing, 13 years since she filed her writ and just over 4 years after she obtained her judgment. She has had to pay for medical treatment for her not inconsiderable injurites herself. This is certainly not how the MV(TPI)A was intended to function.

57. I need to mention a serious ethical matter. The Petitioner's former lawyers appear to have failed in their ethical duties in acting for both defendants on instructions from the Petitioner, filing an amended defence on behalf of both defendants alleging the change of ownership – such a defence was highly prejudicial to Amzad, who would thereupon be admitting to driving without insurance. There is no evidence that Amzad received advice that in view of the investigations, he should be separately represented and file a separate defence. The lawyer had a very clear conflict of interest in amending and filing that joint defence on behalf of both defendants.

58. Finally, the Petitioner complains that the Court of Appeal did not fully address all the issues raised by the Petitioner. No Court is obliged to address every issue or submission raised before it. This is especially so where a particular fact or principle or set of facts or principles would by itself or themselves cause the action or defence to fail, irrespective of all other facts or principles pleaded or raised. All a court is required to do is to consider and rule on those material and relevant facts and issues and the submissions raised before it to fairly dispose of the matter and to provide sufficient reasons to the litigants for its decision. There was nothing wrong with the way in which

the Court of Appeal dealt with the issues raised before it. There is, in my view, nothing in this point raised by the Petitioner.

59. For the reasons set out above, there is no far reaching question of law or matter of great general public importance or a matter that is otherwise of substantial general interest to the administration of justice. The Petitioner does not meet the stringent criteria set out in section 7 of the Supreme Court Act 1998 for leave to be granted for an appeal to the Supreme Court.

60. For the reasons set out above, the judgment of the Court of Appeal is affirmed and the Petition is therefore dismissed.

Orders of Court:

1. The application for Leave to appeal is refused.
2. The Judgment of the Court of Appeal dated 7 May 2018 is affirmed.
3. The Petitioner is to pay Ms. Praveen Lata costs fixed at $5,000, although Mr. Mohammed Nasib and Mr. Sheikh Amzad Saheb are litigants in person, they would have incurred disbursements and lost time to attend to this case, the Petitioner is to pay $1, 000 to each of them.

.....
Hon. Justice Priyantha Jayawardena
Judge of the Supreme Court

SUPREME COURT OF FIJI
FIJI

.....
Hon. Justice Quentin Loh
Judge of the Supreme Court

.....
Hon. Justice Madan B. Lokur
Judge of the Supreme Court

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Mohammed Nasib – 2nd Respondent in person and
Sheik Amzad Saheb – 3rd Respondent in person