

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

Civil Action No. HBC 50 of 2021

**BETWEEN:**           **SEA PILOTS (FIJI) LIMITED** a limited liability company whose registered office is located at 24 Ratu Sukuna Road, Suva, in the Republic of Fiji.

**PLAINTIFF**

**AND:**               **MALCOLM ALEXANDER PECKHAM** Field 40 Road, Lautoka, Ship Captain.

**DEFENDANT**

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

**COUNSEL:**       **Ms. Jackson B.** for the Appellant/ Original Plaintiff  
                  **Ms. Rogers A.** for the Respondent/Original Defendant

**DATE OF DECISION:** 30<sup>th</sup> May, 2024

**DECISION**

*[Application seeking for Leave to Appeal and Stay of Proceedings]*

## Introduction

- 1) The Appellant/Original Plaintiff, Sea Pilots (Fiji) Limited find a Summons on 08<sup>th</sup> November 2023 coupled with an Affidavit in Support and sought for the following orders:
  1. That the Plaintiff be granted leave to appeal to the Court of Appeal the Interlocutory Decision of the Honourable Mr. Justice Vishwa Datt Sharma delivered on 19<sup>th</sup> October 2023;
  2. That in the event leave be granted, the time for filing and serving the Plaintiff's Notice of Appeal be extended by 7 days from the date leave is granted to appeal to the Court of Appeal; and
  3. That the order for the payment of \$1,000.00 be stayed in the event that leave is granted to appeal to the Court of Appeal; and
  4. Any further orders this Honourable Court deem, just fit and expedient.
- 2) Upon the Grounds contained in the affidavit deposed by James Henry Vollmer.
- 3) Notably, no opposition affidavit has been filed and served by the Respondent/Original Defendant.
- 4) However, the Respondent/Original Defendant furnished Court with their written submissions and made oral submissions and argument to oppose the Appellant/ Original Plaintiff's application for Leave to Appeal and stay.

## Plaintiff's/Appellant's Contention

- 5) On 21<sup>st</sup> February 2021, this Court entered orders by consent that the Defendant deliver to the Plaintiff:
  - (a) Plaintiff's Cheque book containing Nos. 6200, 6936 - 7000, 8802 - 8850 and 8751 - 8787 which relate the Plaintiff's ANZ cheque Account; and
  - (b) Invoices and Receipts relating to 143 separate cheque payments the Defendant caused to be paid out of the Plaintiff's ANZ Cheque Account totally the sum of \$601,935.13.
- 6) The Defendant continued to refuse to deliver of the remaining company property being the **Plaintiff's vehicle registration no. CPILOT** and the **Plaintiff's Pilot Boat** service manual and as such the Plaintiff's Inter-Parte notice of motion for injunction order proceeded to Hearing on 05<sup>th</sup> July 2022.

- 7) The Court delivered its decision on 19<sup>th</sup> October 2023, dismissing the Plaintiff's Inter-Parte Motion for injunction order with costs of \$1,000.
- 8) The Court's refusal to grant the Plaintiff with Injunctive Orders, it allowed the Defendant to retain the property that rightfully belongs to the Plaintiff that is, Plaintiff's vehicle Registration no. CPILOT and Plaintiff's PILOT boat service manual.
- 9) Therefore, the plaintiff seeks Leave to Appeal and stay.

#### **Defendant's Contention**

- 10) No substantial reasons have been advanced by the Plaintiff in its affidavits stating any **Exceptional circumstances**. The affidavit is silent on the interests of the Plaintiff and no concrete and/or sufficient reasons are advanced as to why Leave and Stay ought to be granted in the current matter.
- 11) The purported grounds of Appeals are clearly without merit and are untenable.

#### **Determination**

- 12) The Plaintiff/Appellant Sea Pilot (Fiji) Limited is now seeking for grant of Leave to Appeal the **Interlocutory Decision** of this Court delivered on 19<sup>th</sup> October 2023.
- 13) The Defendant as a Director of the Plaintiff Company, Sea Pilots (Fiji) Limited had resigned on 12<sup>th</sup> November 2018 and allegedly had in his possession Plaintiff's Cheque Books, Pilot Boat Service manual, Plaintiff's company Toyota Land Cruiser 'CPILOT', invoices and Receipts, All as company property.
- 14) On 21<sup>st</sup> February 2021, this Court granted **orders by Consent** that the Defendant deliver up to the Plaintiff Plaintiff's cheque books, invoices and receipts.
- 15) The Defendant refuses to return and deliver up to the Plaintiff remaining Plaintiff's property vehicle registration no. 'CPILOT' and the Pilot Boat Service manual for which this Court did not make any order for return in the Plaintiff's Interlocutory Injunction application, decision delivered on 19<sup>th</sup> October 2023.
- 16) The Plaintiff's further submitted that the Plaintiff is the registered owner of vehicle 'CPILOT' and currently denied its usage and that Credit Corporation has registered its financial interest on the Plaintiffs vehicle 'CPILOT'.
- 17) The Defendants affidavit in Reply filed on 18<sup>th</sup> February 2022 failed to provide any evidence that the Defendant is in a financial position to compensate the Plaintiff should he be unsuccessful in establishing his allegation that the Plaintiff agreed to transfer the Plaintiff's

vehicle 'CPILOT' to the Defendant. However, this Court is yet to hear the substantive impending issue and then decide on what orders or relief to be grant.

(i) **Leave to Appeal from Interlocutory Order.**

- 18) The Appellant/ Applicant in his Grounds of Appeal raised a total of 4 grounds of Appeal. These Grounds of Appeal stating those issues suffice to say were already considered in my Interlocutory Decision.
- 19) Reference is made to the Case of **GL Baker Ltd v Medway Building and Supplies Limited** (1958) 1 WLR 1216 followed. It was held that to grant or refuse Leave is a discretionary matter in each case and 'may be reviewed if it is clear that it has been exercised on a wrong principle or a conclusion has been reached which would work a manifest injustice.
- 20) This Court's decision on the interlocutory application for grant of Injunctive orders delivered on 19<sup>th</sup> October 2023, the Defendant told the Court that the Damages are an adequate remedy for the Plaintiff and the 'Balance of Convenience' is only to be resorted to if damages are not an adequate remedy for the Plaintiff. The Court found that the 'status quo of the matter to be maintained until the hearing and determination of the impending issues within the substantive action has been completed.
- 21) In light of the above rational in the decision of 19<sup>th</sup> October 2023, it was abundantly clear that the injunctive orders sought for therein did not show and/or establish any *prime facie* evidence to grant the orders in the interim until the substantive matter is heard and determined.
- 22) In **Totis Incorporated; Sport (Fiji) Limited, Richard Evanson v Joh Leonard Clark & John Lockwood Sellers** (civil appeal no. 35 of 1996S p.15) the Court of Appeal stated as follows:

'It has long been the practice that Interlocutory orders and decision will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory Orders and Decision will only rarely succeed. The Court of Appeal has consistently observed the above principle by granting Leave only in the most exceptionable circumstances.'
- 23) I find that there are no exceptional circumstances in this case to accede to the granting of the relief sought herein accordingly.
- 24) The Appellant will not suffer any injustice or prejudice of the application for Leave to Appeal is refused. It is the Respondents who will be greatly prejudiced if Leave is granted bearing in mind the background and facts of this case.
- 25) Therefore, on the facts and the circumstances of this case, I find that there are insufficient grounds to grant the Leave to Appeal from the Interlocutory Decision delivered on 19<sup>th</sup> October 2023.

(ii) **Stay of Execution**

- 26) The Appellant/Applicant further sought for stay of the Execution of the Judgment herein.
- 27) I have carefully considered the written and oral submissions of the counsels. On the authorities cited, this Court will not make a practice of depriving a successful litigant of the fruits of his/her litigation and depriving the full usage of the vehicle 'CPILOT' and other properties to which *prima facie* he/ she is entitled pending the hearing and determination of the substantive matter [**The Annot Lyle** (1886) 11PD, At 116 C. A), **Monk v Bartram** (1891)1 Q. B.346).
- 28) However, when a party is appealing an Interlocutory Order/Decision exercising doubtful his/her right to appeal, this Court ought to see that the appeal, is successful, is not nugatory [**Wilson v Church** (no. 2) (1879) 12 Ch.D at P. 458, 459 C.A.]. So without the very strongest grounds, the Court will not make an order the possible effect of which would be to render Nugatory, even for a time, a judgment of the High Court. [**McBride v Sandland** 25 C.L.R.369 at 374)
- 29) The grant/or refusal of a stay is a discretionary matter for the Court. [**A.G. v Emberson** (1889) 24 QBD pp 58.59)
- 30) Stay will be granted where the special circumstances of the case so require. There has to be sound reasons sufficient to justify to the Court in suspending the rights of the successful party.
- 31) The Court will look at the facts and circumstances which led to the Interlocutory Decision of this Court of 19<sup>th</sup> October 2023.
- 32) The Appellant/Applicant argues and raises in her written submissions that if the Defendant as the 2<sup>nd</sup> Company Director of the Plaintiff had resigned and acted in a reasonable manner and voluntarily returned all company property in his possession, the Plaintiff wouldn't have had to been put to the expenses of seeking an order from the court to compel the return of the company property from the Defendant.
- 33) The Appellant/Applicant added that the grounds of Appeal have merit and has strong and exceptional chances of success and sought for discretion for stay of execution on the \$1,000 costs ordered by this Court in its Interlocutory Decision of 19<sup>th</sup> October 2023.
- 34) The Appellant/Applicant conceded that if the Plaintiff were to have to pay the costs of \$1,000, it will not render his appeal nugatory.
- 35) The Appellant/Applicant's counsel submitted that the Plaintiff is concerned that the Defendant may be fraudulently holding himself out to the Director of the Plaintiff Company to renew the vehicle 'CPILOT' yearly registration with the Land Transport Authority. The only way the vehicle CPILOT's registration is renewed annually is as if the Plaintiff is holding himself out to Land Transport Authority the necessary authority, which he does not have to the current.

36) For the aforesaid rational, stay will be refused.

**Conclusion**

37) Upon a very careful consideration of the written and oral submissions coupled with the authorities cited and the principle involved in application of this nature, the circumstance shown does not justify the granting of the orders sought for Leave to Appeal the decision of 19<sup>th</sup> October 2023 and stay of proceedings herein accordingly.

38) The Court needs to hear the *viva voce* evidence at the Hearing, deliberate and make a final determination on the impending substantive issue before this court.

**Costs**

39) The interlocutory application proceeded to full hearing with parties making /filing written and oral submissions.

40) The Appellant is hereby ordered to pay a summarily assessed costs of \$1,000.

41) I have no alternative, but proceed to make the following orders.

**Orders**

(i) Leave to appeal is refused in its entirety.

(ii) Stay of proceedings and stay of execution on the \$1,000 costs order is accordingly refused.

(iii) The Plaintiff/Applicant to pay summarily assessed costs of \$1,000 within 14 days timeframe.

Dated at Suva this 30<sup>th</sup> day of May ,2024.



A handwritten signature in blue ink, appearing to read 'V D Sharma'.

VISHWA DATT SHARMA  
PUISNE JUDGE

CC: JACKSON BALE LAWYERS, SUVA  
TOGANIVALU LEGAL, SUVA