

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

Civil Action No. HBC 153 of 2019

**BETWEEN:**            **FIJI PORTS CORPORATION LIMITED** a company having its registered office at Muaiwalu House, Lot 1 Tofua Street, Walu Bay, Suva, Fiji.

**PLAINTIFF**

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

**DEFENDANT**

**Before:**             Hon. Mr. Justice Deepthi Amaratunga

**Counsel:**           Mr. Kumar A. for the Plaintiff  
                             Mr. Kapadia V. for the Defendant

**Date of Hearing:**   22.07.2024

**Date of Judgment:** 23.8.2024

**JUDGMENT**

## **INTRODUCTION**

- [1] Plaintiff filed this action against Defendant for charges amounting \$314,341.68. These were charges for anchorage, mooring and Tug charges involving a vessel MV Sothern Phonex (The Ship), which sank within the boundaries of Port of Suva. Defendant is the registered owner of the Ship and Plaintiff owns and manage four major Ports including the Port of Suva, where the Ship sank. (the Maritime Incident)
- [2] Plaintiff is *inter alia* governed by Sea Ports Management Act 2005 and Sea Port Management Regulations 2008 and pleaded that charges claimed, were in terms of the said gazette notifications.
- [3] Section 81(1)(d) of Maritime Transport Act 2013, limits liability 'notwithstanding any other written law' or 'common law'.
- [4] The Ship was on Charter by PDL International Ltd at the time of the Maritime Incident. According to Defendant the claim for charges in this action must be filed in Admiralty Action No. HBG 01 of 2017 pursuant to orders made in that action, and on that basis, sought the claim struck off.
- [5] Apart from that Defendant also stated that sums of \$78,080 and \$7,680 for mooring charges were not in accordance with the Fiji Government Gazette charges payable to Plaintiff in respect to the Ship.
- [6] Defendant filed summons on 13.8.2019 for strike out of claim sum of \$228,581.68 on the basis that those were tug charges involving the Maritime Incident of the Ship and Defendant had filed Admiralty Action No HBG 01 of 2017 seeking a Decree of Limitation of Liability under Maritime Transport Act 2013, and the order made by the court in said action made on 27.7.2017
- [7] According to Defendant said claim for Tug charges, cannot be made in this action and could only be part of the said Admiralty Action HBG 01 or 2017.
- [8] Plaintiffs position is that it can claim for charges in terms Section 18 of Sea Port Management Act 2005.
- [9] Plaintiff states that the alleged statutory dues are not part of Limitation of Liability under Maritime Transport Act 2013. This is a legal position that can be determined at the hearing, but this issue was not considered in the

decision handed down by Master.

- [10] While the summons for strike out was pending hearing on 11.2.2020 Plaintiff filed summons seeking amendment of the claim to \$228,581.68.
- [11] Both summons were heard by Master and on 11.3.2024 summons for amendment of the statement of claim was allowed and the summons for strike out was dismissed.
- [12] Being aggrieved Defendant filed summons seeking leave to Appeal Master's decision of 11.3.2024.
- [13] Master held that whether Plaintiff's charges fell within the ambit of Section 79(2) of the Maritime Transport Act 2013 is a friable issue for determination at the trial hence the action was not struck off.

## LAW

- [14] Part 5 of Maritime Transport Act 2013 deals with the liability of Ship Owner and Section 76 states,

### PART 5—LIABILITY OF SHIP OWNERS AND OTHERS

#### APPLICATION OF THIS PART

76. This Part applies to every ship, whether registered or unregistered and whether a Fiji ship or not, in any circumstances in which the High Court has **jurisdiction under section 18 (2) of the High Court Act.** (Emphasis added)

- [15] Section 18 of High Court Act 1875 states

- “18.- (1) The High Court has the jurisdiction conferred on it by the Constitution of the Republic of Fiji] and by any other written law and all other jurisdiction necessary for the administration of justice in Fiji
- (2) The High Court has the **admiralty jurisdiction** which the High Court of **Justice in England possessed on 4th December 1987.**
- (3) The High Court has the powers and authority which the Supreme Court had on 4th December 1987.(emphasis

added)

[16] Supreme Court Act 1981 (presently Senior Court Act 1981) conferred jurisdiction to High Court of UK admiralty jurisdiction in terms of Section 20 of the said legislation and it stated

**‘Admiralty jurisdiction of High Court**

- (1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say—
  - (a) Jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);
  - (b) Jurisdiction in relation to any of the proceedings mentioned in subsection (3);
  - (c) Any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and
  - (d) Any jurisdiction connected with ships or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen's Bench Division and directed by the rules to be exercised by the Admiralty Court.
- (2) The questions and claims referred to in subsection (1)(a) are—
  - (a) Any claim to the possession or ownership of a ship or to the ownership of any share therein;
  - (b) Any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
  - (c) Any claim in respect of a mortgage of or charge on a ship or any share therein;
  - (d) Any claim for damage received by a ship;
  - (e) Any claim for damage done by a ship;

- (f) Any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of—
  - (i) The owners, charterers or persons in possession or control of a ship; or
  - (ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible,  
  
being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship;
- (g) Any claim for loss of or damage to goods carried in a ship;
- (h) Any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- (j) Any claim in the nature of salvage (including any claim arising by virtue of the application, by or under section 51 of the [1949 c. 67.] Civil Aviation Act 1949, of the law relating to salvage to aircraft and their apparel and cargo);
- (k) **Any claim in the nature of towage in respect of a ship or an aircraft:**
- (l) Any claim in the nature of pilotage in respect of a ship or an aircraft;
- (m) Any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

- (n) Any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;
  - (o) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);
  - (p) Any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
  - (q) Any claim arising out of an act which is or is claimed to be a general average act;
  - (r) Any claim arising out of bottom;
  - (s) Any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.
- (3) The proceedings referred to in subsection (1)(b) are—
- (a) any application to the High Court under the Merchant Shipping Acts 1894 to 1979 other than an application under section 55 of the [1894 c. 60.] Merchant Shipping Act 1894 for the appointment of a person to act as a substitute for a person incapable of acting;
  - (b) Any action to enforce a claim for damage, loss of life or personal injury arising out of—
    - (i) A collision between ships; or
    - (ii) The carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or
    - (iii) Non-compliance, on the part of one or more of two or more ships, with the collision regulations;
  - (c) any action by ship-owners or other persons under the Merchant Shipping Acts 1894 to 1979 for the limitation

of the amount of their liability in connection with a ship or other property.

- (4) The jurisdiction of the High Court under subsection (2) (b) includes power to settle any account outstanding and unsettled between the parties in relation to the ship, and to direct that the ship, or any share thereof, shall be sold, and to make such other order as the court thinks fit.
- (5) Subsection (2)(e) extends to—
  - (a) Any claim in respect of a liability incurred under the [1971 c. 59.] Merchant Shipping (Oil Pollution) Act 1971; and
  - (b) Any claim in respect of a liability falling on the International Oil Pollution Compensation Fund under Part I of the [1974 c. 43.] Merchant Shipping Act 1974.
- (6) The reference in subsection (2)(j) to claims in the nature of salvage includes a reference to such claims for services rendered in saving life from a ship or an aircraft or in preserving cargo, apparel or wreck as, under sections 544 to 546 of the Merchant Shipping Act 1894, or any Order in Council made under section 51 of the [1949 c. 67.] Civil Aviation Act 1949, are authorized to be made in connection with a ship or an aircraft.
- (7) The preceding provisions of this section apply—
  - (a) In relation to all ships or aircraft, whether British or not and whether registered or not and wherever the residence or domicile of their owners may be;
  - (b) **In relation to all claims, wherever arising (including, in the case of cargo or wreck salvage, claims in respect of cargo or wreck found on land); and**
  - (c) so far as they relate to mortgages and charges, to all mortgages or charges, whether registered or not and whether legal or equitable, including mortgages and charges created under foreign law:

Provided that nothing in this subsection shall be construed as extending the cases in which money or property is recoverable under any of the provisions of the Merchant Shipping Acts 1894 to 1979.” (emphasis added)

[17] It is pertinent to understand Admiralty Jurisdiction and its scope and its development up to 1981 in UK. In *The Goring* [1987] 2 All ER 246, 249 UK Court of Appeal dealt with the historical development of Admiralty Jurisdiction of UK. That was an action involved with a ‘salvage’ operation on a river, hence the issue before the court was whether such claim can be considered ‘admiralty jurisdiction’. For that determination historical development of Admiralty Jurisdiction was discussed and this discussion is relevant for understanding evolution of admiralty jurisdiction.

‘The jurisdiction of the Lord High Admiral is of great antiquity. Originally, which may even have been in Saxon times, it extended only to criminal offences committed on the high seas, but by the late fourteenth century it had come to embrace disputes in all civil matters connected with the sea (see 1 Halsbury's Laws (4th edn) para 301). Gradually he came to assert jurisdiction not only in respect of matters occurring on the high seas, but also on the seas 'within the body of the counties'. The distinction between the main or high seas lying within the body of the counties was that the latter were arms or branches of the sea 'which lies within the fauces terræ, where a man may reasonably discern between shore and shore' (see Hale A Treatise in Three Parts, Pars Prima, De Jure Maris et Brachiorum eiusdem (ed Hargrave, 1787) ch 4, p 10).

This development gave rise to demarcation disputes between the common law courts and that of the Lord High Admiral. The common law courts administered the common law of England and did so with the assistance of juries. The Lord High Admiral not only spurned juries (an unforgivable offence in the eyes of any true blooded Englishman, as readers of the newspapers of today will know) but he administered a law of his own derived in part from such outlandish sources, as the common law courts saw it, as Roman law, the Rolls of Oleron of general average fame and what seemed appropriate to



Mediterranean trading nations. Clearly such pretensions could not be tolerated and in 1389 an Act was passed entitled 'An Act concerning what things the Admiral and his deputy shall meddle' (13 Ric 2 Stat 1 c 5). It provided:

'That the Admirals and their Deputies shall not meddle from henceforth of any Thing done within the Realm, but only of a Thing done upon the Sea, as it hath been used in the Time of the noble Prince King Edward, Grandfather of our Lord the King that now is.' This restriction was not wholly effective and two years later a further Act was passed (15 Ric 2 c 3) providing:

'It is declared, ordained, and established, That of all Manner of Contracts, Pleas, and Quarrels, and all other Things rising within the Bodies of the Counties, as well by Land as by Water, and also of Wreck of the Sea, the Admiral's Court shall have no Manner of Cognizance, Power, nor Jurisdiction; but all such Manner of Contracts, Pleas, and Quarrels, and all other Things rising within the Bodies of Counties, as well by Land as by Water, as afore, and also Wreck of the Sea, shall be tried, determined, discussed, and remedied by the Laws of the Land, and not before nor by the Admiral, nor his Lieutenant, in any wise ... '

This Act is interesting, and would be very relevant if it were still in force, because it not only restricted the jurisdiction of the court of the Lord High Admiral, but substituted the common law as the substantive law to be applied other than in respect of what might be described as 'high seas disputes'. Notwithstanding the clarity of the statute, the struggle between the two courts, with their different procedures and different substantive laws, continued for centuries. At times the Admiralty Court simply ignored the restrictions and the common law courts issued writs of prohibition. At others those who wished to invoke the jurisdiction of one court rather than the other simply averred that all events took place within its jurisdiction and that court, being jealous of the other, refused to allow the allegation to be traversed (see Williams and Bruce *The Jurisdiction and Practice of the English Courts in Admiralty Actions and Appeals* (3rd edn, 1902) introduction, p 6).

Order seems only to have been restored in 1840 with the passage of the Admiralty Court Act, with the long title of 'An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England', which, by s 6, provided:

'... That the High Court of Admiralty shall have Jurisdiction to decide all Claims and Demands whatsoever in the Nature of Salvage for services rendered to or Damage received by any Ship or Sea-going Vessel, or in the Nature of Towage, or for Necessaries, supplied to any Foreign Ship or Sea-going Vessel, and to enforce the Payment thereof, whether such Ship or Vessel may have been within the body of a County, or upon the High Seas, at the Time when the Services were rendered or Damage received, or Necessaries furnished, in respect of which such Claim is made.'

It will be seen that no attempt was made to enact a substantive law of salvage or to treat the law of salvage as being only applicable to the high seas and extend it to tidal or non-tidal waters within the body of a county. The Act was solely concerned with jurisdiction and the High Court of Admiralty was allowed to decide, inter alia, all salvage claims, provided only that the subject matter was a ship or sea-going vessel. It would appear, therefore, that if such a ship could reach non-tidal waters, claim for necessaries there supplied would be a matter for that court and that the same would have been true of a claim for salvage unless the right to salvage was in its nature limited to services rendered on tidal waters.

This was followed by the Wreck and Salvage Act 1846, which I find a somewhat curious statute. By s 40 it affirmed the jurisdiction of the High Court of Admiralty to decide all salvage cases 'whether such Services shall have been performed upon the High Seas or within the Body of any County, anything in any Act contained to the contrary notwithstanding', a section which bore the side note 'High Court of Admiralty may decide in all Salvage Cases, whether on Sea or Land'. It also seems to have made provision for some small salvage cases to be dealt with by justices (s 21), for life salvage and dealing with wreck (s 19). Fortunately it was repealed by the Merchant Shipping Repeal Act 1854.

Less fortunately, Parliament at the same time passed the Merchant Shipping Act 1854. This dealt with 'salvage in the United Kingdom' in ss 458 to 470. The scope of these sections is catholic in the extreme, covering salvage in the traditional maritime sense, life salvage and the preservation of wreck and making special provision for the settlement of disputes. It is, however, clearly confined to matters arising within the United Kingdom. The Act then, by s 476, a section having the side note 'High Court of Admiralty may decide on all Salvage Cases', provided:

*'Subject to the Provisions of this Act, the High Court of Admiralty shall have Jurisdiction to decide upon all Claims whatsoever relating to Salvage, whether the Services in respect of which Salvage is claimed were performed upon the High Seas, or within the Body of any County, or partly in one Place and partly in the other, and whether the Wreck is found at sea or cast upon the Land, or partly in the Sea and partly on Land.'*

The only assistance which I get from this statute is the thought that it may well have limited the jurisdiction of the High Court of Admiralty by excluding it where more specific provision was made by ss 458 to 470 or possibly elsewhere.

Whatever the extent of that jurisdiction, it was transferred to the new High Court of Justice by s 16 of the Supreme Court of Judicature Act 1873. This was followed by the Merchant Shipping Act 1894, which in s 547 and the following sections provided for the summary resolution of disputes concerning salvage where the parties to the dispute consented or the claim was below certain limits and, by s 656, reasserted the jurisdiction of the High Court in traditional terms 'whether the services ... were performed on the high seas or within the body of any county'.

The next jurisdictional statute is the Supreme Court of Judicature (Consolidation) Act 1925, which did no more than continue the position as it existed at the time of the passing of the 1894 Act.

**This brings me to the current source of the Admiralty Court's jurisdiction, namely s 20 of the Supreme Court Act 1981.** This contains no references to the high seas, to the United Kingdom, to tidal or non-tidal waters nor to the body of any county, but instead confers and confirms jurisdiction by reference solely to subject matter. That which is relevant is contained in s 20(2)(j) and reads:

*'any claim in the nature of salvage (including any claim arising by virtue of the application, by or under section 87 of the Civil Aviation Act 1982, of the law relating to salvage to aircraft and their apparel and cargo).'*

This has to be read with s 20(6) and (7). Subsection (6) extends the traditional subject matter of the jurisdiction of the High Court in Admiralty to life and aircraft salvage. Subsection (7) asserts that s 20 applies—

*'(b) in relation to all claims, wherever arising (including, in the case of cargo or wreck salvage, claims in respect of cargo or wreck found on land) ... Provided that nothing in this subsection shall be construed as extending the cases in which money or property is recoverable under any of the provisions of the Merchant Shipping Acts 1894 to 1979.'*

*These are not provisions on which the respondents rely.'*  
**(Emphasis added)**

[18] The long quote from *The Goring* (supra) is relevant to understand the Admiralty Jurisdiction relied on by Defendant, when it had relied on limitation of civil liability in terms of Maritime Transport Act 2013. The type of jurisdiction exercise in an action is preliminary issue.

[19] This action is instituted by Plaintiff exercising civil jurisdiction in terms of Sea Port Management Act 2005 and Sea Port Management Regulation 2008.

[20] The persons who are liable for limitation are contained in Section 78 of Maritime Transport Act 2013 and it reads,

“Persons entitled to limitation of liability under this Part

78.— (1) Subject to subsection (2), the following persons are not personally liable for any act done in good faith, in accordance with the provisions of this Decree—

(a) owners of ships, and any master, seafarer, or other person for whose act, omission, neglect, or default the owner of the ship is responsible;

(b) salvors, and any employee of a salvor or other person for whose act, omission, neglect, or default the salvor is responsible; and

(c) insurers of liability for claims subject to limitation of liability, to the extent that the person assured is entitled to such limitation.

(2) No person shall be entitled to limitation of liability in respect of claims for loss or injury or damage resulting from that person's personal act or omission where the act or omission was committed, or omitted, with intent to cause such loss or injury or damage, or recklessly and with knowledge that such loss or injury or damage would probably result.”

- [21] There is no dispute that Defendant which is a Fiji registered legal entity was the registered owner of the Ship that sank and for which Plaintiff utilized Tugs to move it while it was sinking upon a call of ‘distress’ presumably without form of navigation, when it was tilted and was sinking.
- [22] According to Defendant it was ‘abandoned’ when Plaintiff utilized the Tugs, for removal of the sinking Ship. In the process of removal, it had also sunk while it being dragged. The reason for removal of the Ship, was to minimize the disruption to port activities or ‘cleared the vessel (Ship) from the main berth and infrastructure to the south of the kings wharf where the vessel sank.’ (see paragraph 7 of affidavit in opposition and these facts were not disputed in the affidavit in reply filed on 18.9.2019)
- [23] So removal of the Ship from where it was going to sink had allowed less disruption to the port operations as it was removed from the port infrastructure that would have affected some of the port operations.
- [24] Defendant in the affidavit in opposition stated that they had not contracted with Tug operators or with the Plaintiff for engagement. No such contractual obligation pleaded in the statement of claim.
- [25] So the main contention of the Defendant is that the expenses involved in the removal of the Ship using Tug boats were, the claims with limitation found in Section 79 of Maritime Transport Act 2013.
- [26] The limitation applied to claims stated in Section 79 of Maritime Transport Act 2013.

“Claims subject to limitation of liability

- 79.— (1) Any person who is entitled to limitation of liability shall not be liable for an amount greater than the limit calculated in accordance with section 82 in respect of claims for loss or injury or damage arising on any occasion, being, in

relation to any ship.

(2) The following claims shall be subjected to limitation of liability—

(a) claims in respect of—

(i) loss of life or personal injury; or

(ii) loss of or damage to property, including damage to harbour works, basins, waterways, and aids to navigation,

where the loss or injury or damage occurs on board the ship or is directly connected with the operation of the ship or with salvage operations, or is consequential upon any such loss or injury or damage; or

(b) claims in respect of loss or damage resulting from delay in the carriage by sea of cargo, passengers, or luggage;

(c) claims in respect of loss or damage resulting from infringement of rights other than contractual rights, where the loss or damage is directly connected with the operation of the ship or salvage operations;

**(d) claims in respect of the raising, removal, destruction, or rendering harmless of a ship which is sunk, wrecked, stranded, or abandoned, or of anything that is or has been on board such a ship;**

(e) claims in respect of the removal, destruction, or rendering harmless of the cargo of a ship; or

(f) claims of a person (other than the person liable) in respect of measures taken in order to avert or minimise any loss or injury or damage for which the person liable is entitled to limitation of liability, including claims for further loss or injury or damage caused by the taking of such measures.”(emphasis added)

[27] There are some claims that are not subjected to limitation of liability and they

are found in Section 80 of Maritime Transport Act 2013, and it reads,

“Claims not subject to limitation of liability

80.(1) Notwithstanding anything in section 89 and subject to subsection (2), the following claims shall not be subject to limitation of liability—

(a) claims for salvage or contribution in general average; and

(b) claims in respect of nuclear damage.

(2) Claims in respect of the matters specified in sections 79 (2) (d), (e), and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.”

[28] The application of the said limitation of liability is found in Section 81 of Maritime Transport Act 2013, and it reads,

‘Application of limitation of liability

81.(1) The limitation of liability under this Part—

(a) applies to the aggregate of relevant claims arising on any distinct occasion against—

(i) the owner of the ship, and any seafarer or other person for whose act, omission, neglect, or default the owner is responsible;

(ii) the owner of a ship rendering salvage services, and the salvor operating from that ship, and any employee of the salvor or other person for whose act, omission, neglect, or default that owner or salvor is responsible; or

(iii) a salvor who is not operating from a ship, or is operating solely on the ship to or in respect of which the salvage services are rendered, and any employee of the salvor or other person for whose

act, omission, neglect, or default the salvor is responsible; and

(b) relates to all relevant claims for loss or injury or damage arising on any distinct occasion, whether or not the loss or injury or damage is sustained by more than 1 person;

(c) applies in respect of each distinct occasion, without regard to any liability arising on any other distinct occasion; and

**(d) applies, subject to subsection (4), whether the liability arises at common law or under any other written law, and notwithstanding anything in any other written law.**

(2) This section **shall not limit or affect section 96** of this Act” (Emphasis added)

[29] Section 81(1)(d) of Maritime Transport Act 2013 states ‘subject to subsection (4)’, but there are only two subsections . Subsection 2 makes exceptions to limitations and they are found in Section 96 of Maritime Transport Act 2013.

[30] Section 96 of the Maritime Transport Act 2013, refers to Removal of Hazard for Navigation and it reads

“Removal of hazards to navigation

96. (1) The Authority may cause to be removed, any ship or aircraft referred to under section 94, which is a hazard, if the

(a) owner of the hazard has not made arrangements under that section to secure and remove the hazard;

(b) Chief Executive Officer considers the hazard is a hazard to navigation; and

(c) Action taken to remove the hazard is consistent with the



Environment Management Act 2005.

- (2) The Chief Executive Officer may, by notice in writing require the owner, master or person in command of the hazard, or to any agent of the owner, to raise, remove or destroy the whole or any part of that hazard in a manner satisfactory to, and within such time as may be specified in the notice.
- (3) If a person fails to comply with the notice, or if a person to whom the notice can be given cannot be found, the Chief Executive Officer or a person authorized by the Chief Executive Officer may—
  - (a) take possession of and raise, remove or destroy the whole or any part of the hazard;
  - (b) sell, in such manner as he or she thinks fit, the hazard or any part of it that is so removed, and any property recovered from it, and in the exercise of his or her powers under this section, recover the whole of the expenses of removal, from the proceeds of sale of such hazard or any part thereof; and
  - (c) if the proceeds of the sale are insufficient to pay the whole of the expenses of removal, recover the balance from the owner or master or person in command of the hazard, or from the owner of any ship or aircraft or from any other person if the sinking, stranding, or abandonment occurred through the fault or negligence of that ship, aircraft, or person.
- (4) This section applies to every article belonging to or forming part of a ship or aircraft, as it applies to a ship or aircraft, and the proceeds of the sale under this section of any ship or aircraft or any part of it or other property recovered from it shall be regarded as the fund of the Authority pursuant to section 38 (d) of the Maritime Safety Authority of Fiji Decree 2009.
- (5) For the purposes of this part,

"hazard" means any derelict ship or aircraft, any floating or submerged or stranded object.

- (6) In this section, "owner" in relation to any hazard, includes not only the owner or owners at the time of the sinking, stranding, abandonment, or other event, but also any subsequent purchaser of the hazard or of any article belonging to it or forming part of it, as long as the hazard remains a hazard to navigation.
- (7) Any person who acts in contravention of this section commits an infringement offence in accordance with section 262 and shall be liable to a fine not exceeding \$5,000 and, if the offence is a continuing one, to a further fine not exceeding \$250 for every day or part thereof during which the offence is continued.

[31] It was stated that subject to Section 96 the limitation are applicable in terms of Section 81 of Maritime Transport Act 2013.

[32] In terms of Maritime Transport Act 2013, the liabilities arises from common law or under any other written law cannot override the statutory provision in another law. This was not considered by Master and needs to be considered along with Section 79 of Maritime Transport Act 2013. This legal issue alone is sufficient grant leave to appeal from the interlocutory decision where the summons for strike out was struck off.

[33] So the issue before the court is whether Plaintiff can institute this action for a claim for expenses in terms of statutory provisions for engagement of Tugs before the Ship was fully sunk , but was under 'distress' when Plaintiff received a message of 'distress' and decided to involve tugs to 'clear port infrastructure'.

[34] The long title of the Maritime Transport Act 2013 reads;

"FOR THE IMPLEMENTATION OF FIJI'S OBLIGATIONS UNDER THE IMO CONVENTIONS AND TO ENSURE THAT PARTICIPANTS IN THE MARITIME TRANSPORT SYSTEM ARE RESPONSIBLE FOR THEIR ACTIONS AND TO CONSOLIDATE RELATED MARITIME LAWS INCLUDING THE PROTECTION OF THE MARINE ENVIRONMENT AND FOR RELATED MATTERS."

[35] So the interpretation of the provisions contained in Maritime Transport Act 2013 should take in to consideration Fiji's obligations under International

Maritime Organization's Conventions and for that International Convention on Limitation of Liability for Maritime Claims is relevant. First Convention was 1937 and later 1976 and 1996 Protocols were adopted internationally.

[36] In terms of Maritime Transport Act 2013, the list of international conventions that are applicable for consideration of the issues under said Act are contained in the first Schedule and the relevant portion reads,

“LIST OF CONVENTIONS<sup>1</sup>

1. Articles of, and Annexes to, the International Convention on Load Lines 1966, Protocol 1998, and future amendments to the Conventions and Protocol.
2. Convention on the International Regulations for Preventing Collisions at Sea, 1972, and future amendments to the Conventions.
3. International Convention for the Safety of Life at Sea, 1974, Protocol 1978, Protocol 1988, all mandatory Codes and future amendments to the Conventions, Protocol & Codes.
4. International Convention on Standards of Training Certification and Watchkeeping (STCW), 1978 and future amendments to the Convention and Code.
5. **International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships and Protocol 1957 and future amendments to the Conventions and Protocol.**
6. International Convention on Tonnage Measurement of Ships, 1969 and future amendments to the Convention.
7. International Convention for the Prevention of Pollution from Ships of 1973, Protocol 1978, Protocol 1997 and future amendments to the Conventions and Protocols.
8. International Convention on Maritime Search and Rescue 1979 and future amendments to the Convention.
9. International Convention for the Control and Management of Ships Ballast Water and Sediments (BWM Convention) 2004 and future amendments to the Convention.
10. International Convention on the Control of Anti-Fouling Systems on Ships 2001 and future amendments to the Convention.
11. International Convention on Facilitation of International Maritime Traffic 1965 and future amendments to the Convention.

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<sup>1</sup> Act No 14 of 2014 (date of commencement 1.1.2015 ) Laws of Fiji Vol 17

12. International Convention on Oil Pollution Preparedness, Response and Cooperation, OPRC-HNS Protocol 2000 and future amendments to the Convention and Protocols.
13. International Convention on Salvage, 1989 (Salvage Convention) and future amendments to the Convention.
14. Maritime Labour Convention 2006 and future amendments to the Convention.
15. International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 and future amendments to the Convention.
16. Protocol. Relating to the Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973 and future amendments to the Protocol.
17. Convention on the International Maritime Mobile Satellite Organization 1976 and future amendments to the Convention."(emphasis added)

[37] Section 24 of High Court Act 1875 states

‘Imperial laws to be subject to Fiji jurisdiction and Acts. All Imperial laws extended to Fiji by this or any future Act shall be **in force therein so far only as the circumstances of Fiji and its inhabitants and the limits of its jurisdiction permit and subject to any existing Or future Acts** of the Parliament of Fiji and for the purpose of facilitating the application of the said laws it shall be lawful for the Court to construe the same with such verbal alteration not affecting the substance as may be necessary to render the same applicable to the matter before the Court, and every judge or officer of the Court having or exercising functions of the like kind or analogous to the functions of any judge or officer referred to in any such law shall be deemed to be within the meaning of the enactments thereof relating to such last-mentioned judge or officer, and whenever the Great Seal or any other seal is mentioned in any such statute it shall be read as if the seal of the were substituted therefore, and in matters of practice all documents may be written on ordinary paper notwithstanding any directions as to printing or engrossing on vellum, parchment or otherwise.”

### **INTERNATIONAL CONVENTION ON LIMITATION OF LIABILITY**

[38] Limitation of liability regarding perils in sea has a long historical development and development of this under Admiralty Jurisdiction was through local legislation, but due to comity of nations and subsequent development of the scope required international convention.

[39] Justification for limitation of Maritime Claims and its development is described in the text of Modern Maritime Law (Vol 2) <sup>2</sup> at 739,740 pages stated,

“The concept of limitation of liability is ancient, and its origin goes back to the 1600s. The owner of a ship was absolutely liable for the loss of goods, because he was a common carrier and liable by the custom of the realm, even though the goods were stolen without his fault or privity. As Lord Denning said in *The Eresthenes*, that was settled in 1674 in the great case of *Morse v Slue*, and because the law operated so harshly on ship-owners, Parliament passed the first of the Merchant Shipping Acts (MSAs) (7 Geo 11 c 65) in 1734, saying that: a ship-owner was not to be held liable for any loss or damage occasioned by the master or mariners ‘without the privity and knowledge’ of the owner to an amount greater than the value of the ship. This was followed by a succession of MSAs, all of them directed to limiting the responsibilities of the ship-owner for the acts or defaults of his servants. The rest is history. Why then does the law seem to be benevolent to ship-owners? **The concept has developed more on the basis of public policy than on a critical legal analysis of concepts of fault and recompense.** It is justified for practical reasons and convenience<sup>3</sup> in order to permit recovery by many claimants in proportion to their loss. The system has also been designed to encourage and protect trade. Some have argued that limitation of liability is anachronistic and overprotective of ship-owners and their insurers.<sup>4</sup> However, if there was unlimited liability, there would be no insurance capacity to insure risks for liability to third parties. Limitation ensures that insurance, which is now compulsorily imposed by almost all the International Conventions (as will be seen in the chapters of this Part), is obtained, and, thus, victims are protected, even if their claims are not fully met. The rationale for ship-owners’ limitation of liability was put in a nutshell by Mr Justice Staughton (as he then was), in *The Garden City*:

The reasoning behind the Convention may now be that ship-owners should be encouraged to insure against liability, and limitation makes it easier for them to do so; but that limitation should not be tolerated in the case of outrageous conduct, such as deliberately or recklessly causing loss. However, the historical reason for the introduction of

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<sup>2</sup> MANDARAKA-SHEPPARD. A. (2013). *Modern maritime law , Managing Risks and Liabilities* (third edition ) , Informa Law from Routledg.

limitation appears to have been to enable British ships to trade on equal terms with those of other nations.

Over 20 years later, the CA, in **CMA v Classica Shipping**, affirmed that the object and purpose of the Limitation Convention is to encourage the provision of international trade by way of sea carriage. It does so by limiting the liabilities that arise on a distinct occasion

The sustainability of a viable insurance system facilitates trade, boosts the employment of a large part of the workforce and, consequently, allows other infrastructures of the service industries to operate. Had it not been for limitation, freight and fuel prices would not be competitive, and the movement of goods would be slower or more difficult. The dependent and related services would suffer, which would have a knock-on effect on the prosperity of a country and, generally, on employment. These reasons provide significant justification for nations to reach consensus and sign up to International Conventions in favour of limitation.’

**CMA CGM SA v Classica Shipping Co Ltd** [2004] 1 All ER (Comm) 865 UK Court of Appeal held,

“ A right for a ship owner to limit his liability in respect of certain claims according to the tonnage of his ship has been granted by United Kingdom statute for a long time but the matter has been increasingly dealt with by international convention. Both the United Kingdom statutory history and the history of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924; TS 17 (1931); Cmd 3806) and the International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships (Brussels, 10 October 1957; TS 52 (1968); Cmnd 3678) (the 1957 convention) are set out by the judge. This species of limitation is now governed, as far as this country is concerned, by the Convention on Limitation of Liability for Maritime Claims 1976 (as set out in Sch 7 to the 1995 Act) (the 1976 convention). The current United Kingdom statute is the 1995 Act which, by s 185, enacts that the provisions of the 1976 convention shall have the force of law in the United Kingdom.”

[40] The applicability of Convention on Limitation of Liability for Maritime Claims and its latest amendments and protocols are included in Schedule 1 as quoted previously, in Maritime Transport Act 2013, so to that extent

applicability of Convention on Limitation of Liability for Maritime Claims , its amendments and Protocols are statutorily made in to domestic laws .

[41] In the light of the above mention application of international conventions and protocols to Limitation of Liability for Maritime Claims and domestic application of the same for the claim pleaded is relevant for the application for strike out of the claim pleaded in the statement of claim.

[42] At the leave stage I do not have to consider all the legal issues , but only suffice to state that domestic statutory provisions that refers to latest amendments and Protocols are relevant for interpretation of the provisions relating to limitations on civil liability which Defendant relied for the strike out and these were not considered by Master.

### **GROUND OF APPEAL**

[43] Proposed Grounds of Appeal are as follows,

- a) Learned Master erred in law and in fact in holding at paragraphs 23 and 24 of her Ruling that the vessel “Southern Phoenix” had not sunk and that the issue whether the Plaintiff claim falls within the ambit of Section 79 (2) of the Maritime Transport Act is an issue for determination in trial.
- b) That the Master erred in law in not considering the provisions of Section 79 of the Maritime Transport Act 2013 that applied to the sinking of the MV Southern Phoenix and that the Appellant was entitled to rely on the Limitation of Liability Order made on the 27<sup>th</sup> July 2017 in High Court Civil Action No. 1 of 2017 for any claims relating to loss or damage arising on any occasion in relation to the vessel which suffered the casualty to be filed in that action.
- c) That the Master erred in law in not considering the Judgment of the Fiji Court of Appeal No. ABU 0049 of 2021 dated 24<sup>th</sup> February 2023 which held that all claims in respect of the casualty relating to the vessel from a casualty are to be dealt with in the Limitation of Liability Action No. 01 of 2017.

- [44] In the proposed Grounds of Appeal, relate to the interpretation of Section 79 of Maritime Transport Act 2013, which required careful consideration of domestic law which refers to latest amendments and Protocols of Convention on Limitation of Liability of Maritime Claims.
- [45] In the Masters analysis of is found in paragraph 21-24 of the decision which reads,
- “21. Section 18(1) of the Sea Ports Management Act speaks for port management company levy rates and charges. This is done by order in the Gazette.
22. It includes towing of any vessel or the rendering of any other assistance; the provision of services by tugs and line boats.
23. As far as the pleading is concerned and the affidavit filed, the vessel had not sunk and it was cleared from the main berth to the south of the Kings Warf were it sank.
24. The issue whether the charges claimed by the Plaintiff falls within the ambit of section 79 (2) of the Maritime Transport Act is an issue for determination in trial. Hence the Defendant’s application shall fail”
- [46] From the above there are merits in the grounds of appeal relating to interpretation of the claim for towage during a distress of the Ship while it was sinking, and whether this is a claim that can be made in this action based on the statutory provisions pleaded in the statement of claim.
- [47] There can only be two outcomes in this application, but the manner in which that outcome is reached is more important in the jurisprudence of Fiji considering Comity of Nations founded on Convention on Limitation of Liability of Maritime Claims and latest protocols, in terms of Maritime Transport Act 2013.
- [48] Plaintiff’s objection to leave to appeal is not regarding the merits of the proposed appeal. Defendant had filed summons seeking leave to appeal on 25.3.2024 at 8.55 am. Perusal of case record show.



[49] This was the last day for filing and serving in terms of Order 59 rule 11 of High Court Rules 1988, which reads,

‘Application for leave to appeal (O 59, R11)

Any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment’.

[50] Plaintiff admits that they were served with summons and affidavit on 25.3.2024 which was within the time period. The only issue was the summons was not issued by the court by 25.3.2024, and brought to my notice on 26.03.2024 and it was also issued on the same day on the urgent basis and the summons was also listed on 29.04.2024 and directions were given filing of the affidavits and the matter was listed for hearing on 22.7.2024 considering the importance and urgency in determination of interlocutory decisions without a delay.

[51] It was not disputed that Plaintiff’s solicitors had received a copy of the filed summons and also affidavit in support of the said summons issued by the court on 25.3.2024. There was no issue that the served copy being different to the one that was filed.

[52] So there was filing and service of the summons and affidavit in support in terms of Order 59 rule 11 of High Court Rules 1988 at this stage of hearing considering the importance of the issues before the court and merits of the proposed appeal.

[53] Plaintiff’s position that Defendant was required to file separate application for extension of time cannot be accepted as they had filed summons within time. The Latin maxim *non pro tunc* can be applied considering the importance of the appeal grounds and case management principles. Plaintiff was duly informed of the application seeking leave to appeal. Latin maxim *actus curiae neminem gravabit* is applicable.

[54] There is no requirement to file any extension of time in this instance as this will only add up to case load and waste of time and also delay in the determination of interlocutory decision . It is also admitted that since Defendant had filed the summons within time along with affidavit in support issued by the court but the summons not issued by the court on the same day. Accordingly objection raised by Plaintiff is technical and cannot affect

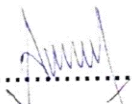
the outcome of the leave. So the leave is granted for Defendant against Master's decision of 11.3.2024.

[55] Considering the nature of the application and legal issues involved it favors granting stay of the proceedings before Master until final disposal of the appeal.

**FINAL ORDERS:**

- a. Leave to appeal against Master's interlocutory rule handed down on 11.3.2024
- b. Stay of all proceedings before Master until final disposal of the appeal against Master's decision
- c. No order as to costs.



  
.....  
Deepthi Amaratunga  
Judge

**At Suva** this 23<sup>rd</sup> day of August, 2024.

**Solicitors**  
**Patel Sharma Lawyers**  
**Kapadia Lawyers**