IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

MISCELLANEOUS ACTION 13 OF 2010

BETWEEN: SOUTH SEA CRUISES LIMITED

Appellant

AND: SAMSUL MODY

Respondent

Date of Hearing: Monday, 16th August 2010

Counsel: Mr F. Hanif for the Appellant
Mr E. Maopa for the Respondent

Date of Ruling: Thursday, 26th August 2010

RULING

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1. This is a case where serious personal injuries were sustained by the Respondent to this application, Mr Samsul Mody, on board "SV Seaspray" a sea going vessel owned and operated by South Sea Cruises Limited, the applicant for leave to appeal from judgment of the High Court dated 20th April 2010. On 19th February 2006 Mr Mody was a cruise passenger when he consumed caustic soda stored in a bottle that was labelled water.

2. There are proceedings issued on 11th August 2008 by Mr Samsul Mody in the Supreme Court of New South Wales claiming damages for personal injuries.

3. On 20th October 2008 the applicant for leave to appeal (SSCL) filed a writ of summons with an indorsed claim seeking to have its limitation of liability determined pursuant to section 178(1) of the Marine Act 1986 in respect of the personal injury sustained on 19th February 2006.

4. On 22nd December 2008 the applicant for leave to appeal (SSCL) filed a summons for a decree of limitation of liability in damages beyond Special Drawing Rights of 62001 converted into Fiji Dollars.

5. On 20th March 2009 Mr Justice Hoeben in the Supreme Court of New South Wales dismissed a motion of Mr Samsul Mody that the applicant for leave to appeal (SSCL) be restrained from continuing or further pursuing the Fiji proceedings seeking limitation of liability under section 178(1) of the Marine Act 1986.

6. The summons for a decree of limitation was heard by Madam Justice Phillips on 27th March 2009. By consent of both the applicant for leave and the Respondent to the application, Mr Justice Sosefo Inoke delivered the decision on 20th April 2010. Mr Justice Inoke himself heard no oral argument but had Madam Justice Phillips note of hearing and written submissions from the parties. Counsel are before me, Mr F. Hanif for SSCL and Mr E. Maopa for Mr Samsul Mody.

Throughout this limitation action there has been no change of counsel and Mr Hanif and Mr Maopa appeared before Madam Justice Phillips and it was their submissions that were considered by Mr Justice Inoke.

7. The judicial decision of 20th April 2010 is headed "Interlocutory Judgment". The following passages are the ones on which Mr Justice Inoke gives his reasons for the orders that he made and the orders themselves.

> "[13] South Sea Cruises own evidence is that Mr Ratatagia was negligent. That much is clear from the affidavit of its CEO in the passages that I have quoted above. What is not admitted by them is that Mr Ratatagia was not an employee or servant and therefore South Sea Cruises is not vicariously liable. They argue that there was no "privity" between them and Mody. It is admitted that the vessel is owned by South Seas Cruises and Mody was injured whilst on it.
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> [14] **Part IX** of **The Marine Act** provides for "Marine Rights and Liabilities". **Division 1** of that Part sets out the provisions for the liability of shipowners "**in collisions**" for personal injuries and **Division 2** sets out the provisions for the limitation of that liability under the "Limitation of Liability Convention". South Seas Cruises relies on **s178** which is in Division 2 of the Act.
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> [15] Mody's personal injuries were not as a result of a collision between the Seaspray and another vessel. Clearly, the Act and the Conventions have no application to this case. I must say that I had to check myself to make sure that I was right. Such a slip by any counsel, let alone by both counsel from either side must be very rare.
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> [16] The application must be dismissed.
>
> **THE WRIT**
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> [17] The Writ claims the same principal relief as the Limitation Application so it too should be dismissed and I do so as an exercise of this Court's inherent jurisdiction to ensure that its process is not abused.

COSTS

[18] Although neither counsel realised the futility of the application I think it was the mistake attributable to South Seas Cruises and its solicitors that required Mody to defend it and the action so they should pay Mody's costs.

[19] This is one of those cases where indemnity costs are justified. Substantial material have been filed, the matter had been called on several occasions and there was a day's hearing. I think costs of $10,000 is a fair amount so I order accordingly.

ORDERS

[20] The Orders are therefore as follows:

1. The Plaintiff's Writ filed on 20 October 2008 and the Summons filed on 22 December 2008 are dismissed and struck out.

2. The Plaintiff shall pay the Defendant's costs of $10,000 within 21 days."

8. Mr Justice Inoke heard an application by the applicant (SSCL) for leave to appeal and to stay the costs order on 23rd June 2010 and delivered a further decision headed "Interlocutory Judgment" on 30th June 2010.

9. In this judgment additional reasons are given by the learned Judge for refusing the application. These are of no relevance to the Court of Appeal should leave be granted because it is only the reasoning and orders in the Judgment of 20th April 2010 that is relevant on appeal.

10. Mr Justice Inoke's judgment of 30th June 2010 concluded :

"[27] For these reasons, I am not persuaded that I was clearly wrong in dismissing the Plaintiff's limitation application and action. There are no special circumstances justifying leave to appeal. Indeed, I think the circumstances of this case and the duality of proceedings in two different jurisdictions could give rise to different findings on the same law and facts.

This is undesirable and therefore requires me to end this action by refusing leave.

[28] In respect of the application for leave to appeal the costs award I have explained the reasons for the exercise of my discretion in my judgment and am not convinced that the Court of Appeal is likely to overturn my award. I therefore refuse leave to appeal against my costs award of 20 April 2010.

APPLICATION FOR STAY

[29] Leave having been refused there is no need for me to consider or grant the application for stay of my costs order of 20 April 2010.

[30] The plaintiff having lost his application for leave and stay should also pay the Defendant's costs which I summarily fix at $600 to be paid within 28 days.

ORDERS

[31] The Orders are therefore as follows:

a. The Plaintiff's application for leave to appeal and stay filed on 11 May 2010 is dismissed.

b. The Plaintiff shall pay the Defendant's costs of this application of $600 within 28 days."

11. On 13th July 2010 the applicant (SSCL) for leave to appeal issued a Summons in this Court for leave to appeal out of time. This was returnable on Tuesday 10th August 2010. On 10th August 2010 the parties were intent on an agreed adjournment which I granted until 16th August 2010. On 10th August 2010 I also ordered an interim stay on the costs order of F$10,000 ordered on 20th April 2010.

12. Since 10th August 2010 I have received a number of documents. There is an amended summons from the applicant dated 13th August 2010. The amendment is necessary because word processing involves very often merging of texts. It seems that by mistake grounds of appeal from another case were inserted in the

13th July 2010 document. The correct grounds of appeal were known to both parties from the earlier listing of this matter. In these circumstances I gave leave to amend and to file under section 21(1)(c) of the Court of Appeal Amendment Act 1998.

13. There is an affidavit filed by the Respondent to the application on 12th August 2010. I have read it carefully.

14. The applicant for leave's written submissions were filed on 13th August 2010. I have read these and have been assisted by them. I have also been assisted by the written submissions on behalf of the Respondent Mr Mody which were filed on 16th August 2010.

15. I consider firstly the question of whether the application for leave to appeal to the Court of Appeal is within time. There is a related second question raised by Mr Maopa on behalf of the Respondent. The question is whether there is a further application as of right to the Single Judge of the Court of Appeal should the initial application, which has to be made to the High Court judge be refused. Mr Maopa submits that with regard to an interlocutory judgment or order, this second application for leave is vexatious.

16. Section 12 of the Court of Appeal Act Cap 12 relates to appeals to the Court of Appeal in civil matters. Sub section (2) as relevant says :

> "(2) No appeal shall lie ...
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> ... (f) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court."

17. Rule 26(3) of Court of Appeal Rules states :

> "(3) Whenever under these rules an application may be made either to the Court below or to the Court of Appeal, it shall be made in the first instance to the Court below."

18. Rule 16 of the Court of Appeal Rules concerns time within which notices of appeal shall be filed.

> "(16) Subject to the provisions of this rule every notice of appeal shall be filed and served ... within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected) that is to say.
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> (a) in the case of an appeal from an interlocutory order, 21 days."

19. The words of section 12(2) of the Act must be interpreted according to the usual canons of statutory interpretation and so interpreted must prevail in interpreting the rules which are subsidiary legislation. The meaning of "without the leave of the judge or of the Court of Appeal" is beyond dispute. If you fail before the High Court Judge you can still succeed in obtaining leave to appeal from an interlocutory judgment or order from the Court of Appeal. Rule 26(3) is in place to ensure that the would-be appellant in an interlocutory matter must make his first attempt before the judge of the High Court. If he fails, he has a second chance before the Court of Appeal where the Single Judge will decide leave applications.

20. If the Rules were clear they would stipulate the time for applying for leave to appeal to the High Court Judge. The Rules if they were clear would also stipulate the time for applying for leave to the Court of Appeal should leave be refused by the High Court Judge.

21. However Rule 16 is not clear. For one thing it relates to a Notice of Appeal rather than an application for leave to appeal. For another if you interpret 21 days in Rule 16(a) as meaning that the time for the application for leave to the High Court Judge is 21 days, there is no provision at all for the stipulation of time in which the second application, the application to the Court of Appeal shall be filed.

22. Given the statutory policy of section 12(2) of the Act the period of 21 days in Rule 16 must relate to the application that has to be made first of all the High Court Judge. The period of time in which to make the second application to the Court of Appeal must be within a reasonable time of the date on which the High Court Judge's judgment or order refusing leave to appeal was signed and entered or otherwise perfected. What is a reasonable time in this context? Given the statutory policy of section 11(2) and the time of 21 days in Rule 16 the presumed period of time for the second application must also be 21 days from the perfecting of the first judgment or order refusing leave.

23. Applying these rules I note that in this case Mr Justice Inoke perfected his order refusing leave to appeal on 30th June 2010. Since the applicant for leave (SSCL) filed its summons on 13th July 2010 which is well within 21 days of the refusal, SSCL is within time. It does not require an extension of time although from an abundance of caution it has applied for an extension of time should it be necessary.

24. With regard to Mr Maopa's submission that the Act and Rules allow only an application to the High Court Judge which if refused ends the possibility of appeal, I do not accept it. Firstly there is the policy of section 11(2) of the Act. Secondly it is to be presumed that where leave is necessary for an appeal to a higher court, the lower court's refusal cannot be final. If the lower court had a veto upon an appeal to a higher court from its judgment or order the standards

of appeal accepted in those jurisdictions where the common law prevails would not be met.

25. I now turn to the issue at the centre of this application. In considering this leave application it is not my task to decide the appeal in advance.

26. In this case Mr Justice Inoke headed this order as an interlocutory one. He did this because he made a finding that the applicant's originating summons and writ were an abuse of process. I have no doubt that the Plaintiff's High Court writ and summons and affidavit were prepared and served in accordance with those published in Atkin's Encyclopedia of Court Forms in Civil Proceedings under the sub-title Admiralty and the heading limitation actions. The expectation of the Plaintiff was that the declaration of limitation would be made on that directions for further evidence or enquiry would be given. If the Court raised the summons for declaration of limitation and dismissed the writ then the only expectation was that there would be a final judgment and a right of appeal to be exercised as of right within 6 weeks. Somewhere the learned judge became confused and dismissed the summons and the writ for abuse of process and decided that his judgment was an interlocutory judgment. Yet the Plaintiff's process was in fact correct and common place in light of the relevant facts and law and could not possibly be found to be an abuse of process.

27. The effect of categorising a decision as interlocutory is that you have to obtain leave to appeal either from the High Court or the Court of Appeal. That is an expensive and time consuming exercise. But there is another serious disadvantage for the litigant who wishes to appeal an interlocutory judgment or order. That arises from the policy explained in the cases and said to be the intention of the legislature that interlocutory appeals are to be discouraged and leave to appeal is rarely to be given.

28. The leading cases in Fiji are ***K. R. Latchan Brothers Limited v. Transport Control Board*** Civil Appeal No.ABU0012 of 1994 (Full Court) and ***Kelton Investments Limited v. Civil Aviation Authority of Fiji*** Civil Appeal 34 of 1995.

29. In ***K. R. Latchan Brothers Limited*** (supra) the issue was whether the trial judge hearing an application for judicial review was plainly wrong when in an exercise of discretion he ordered cross-examination of certain witnesses. Order 53 Rule 8 clearly gives power to make such an order. Leave to appeal was refused by Mr Justice Thompson sitting as a single judge of appeal and by the Full Court. The Full Court at page 2 cited and approved what Mr Justice Thompson said in his judgment when he stated :

> "The granting of leave to appeal against an interlocutory order is not appropriate except in very clear cases of incorrect application of the law. It is certainly not appropriate when the issue is whether discretion was exercised correctly unless it was exercised either for improper motives or as result of a particular misconception of the law. The learned judge has given full reasons for the order he has made. There is no suggestion of impropriety in the appellant's affidavit. There is an allegation of misconception of the law, but if there was a misconception of the law, it is not a clear case of that."

30. In ***Kelton Investments Ltd*** (supra) at pages 4 and 5 Sir Moti Tikaram the President of the Court of Appeal said :

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

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

The following extracts taken from pages 3 and 4 of the written submissions made by the Applicant's Counsel are also pertinent :

> '.....
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> 5.2 The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible (per Murphy J in *Niemann v Electronic Industries Ltd* (1978) VR 431 at 441-2). The legislature has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds a reason to grant leave (*Décor Corp v Dart Industries* 104 ALR 621 at 623 lines 29-31).
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> 5.3 **Leave should not be granted as of course without consideration of the nature and circumstances of the particular case** (per High Court in Ex parte Bucknell (1936) 56 CLR 221 at 224).
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> 5.4 **There is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights.** The appellant contends the Order of 10 May 1995 determines substantive rights.
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> **5.5** Even 'if the order is seen to be clearly wrong, this is not alone sufficient. **It must be shown, in addition, to effect a substantial injustice by its operation'** (per Murphy J in the *Niemann* case at page 441). The appellant contends the order of 10 May 1995 determines substantive rights.

5.6 In *Darrel Lea v Union Assurance* (1969) VR 401 at 409 the Full Court of the Supreme Court of Victoria said :

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

31. In my opinion the restrictive approach does not apply where in the Court below the pleadings, the facts and the law could not possibly be found to be an abuse of process. Where that is the situation the only just way of treating leave to appeal is to approach it on the basis that the Plaintiff now the applicant for leave to appeal should be treated as a party with an appeal as of right to the Court of Appeal.

32. But if the exercise of applying the restrictive rules for leave to appeal is done in my opinion the result is the same.

33. I have no doubt that the issue of whether limitation actions are restricted only to collisions between vessels is one of law and an issue of great public importance. A large proportion of injuries and deaths on vessels at sea do not involve collisions between vessels. The scope of the 1957 International Convention Relating to the Limitation of the liability of Owners of Sea Going Ships as amended by the Protocol done at Brussels in 1979 and brought into Fiji municipal law by the Marine Act No.35 of 1986 is a very important question of law. I have no doubt also that it would be a substantial injustice to the Plaintiff's company (SSCL) who is the applicant for leave before me were it not to have the chance to have this issue decided by the Court of Appeal.

34. There is also the issue of what is meant by the words "unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner" in Article 1 of the 1957 Brussels Convention.

35. This also is a matter of law of great public importance around the world because merchant shipping is an international activity of immense importance to world trade. It would cause substantial injustice to the Plaintiff in these proceedings (SSCL) were they not able to take this issue to the Court of Appeal.

36. With regard to the order for judgment of costs of F$10,000 on an indemnity basis I would grant leave to appeal on that point as well. It is unusual to grant leave in respect of costs orders but then the finding of abuse of process which precipitated the order was also unusual. In addition the authorities conveniently set out by Madam Justice Scutt in ***Prasad v Divisional Engineer Northern (No.2)*** [2008] FJHC 234 clearly show that the conduct of proceedings has to be blameworthy reprehensible and exceptional to attract the imposition of indemnity costs. In addition Mr Justice Inoke should have given notice to the Plaintiffs that he was considering ordering indemnity costs against them.

37. The scope of an appeal in respect of an interlocutory judgment or decision is usually confined to a single issue. For example if an interlocutory injunction is ordered in the High Court, and an appeal is heard by the Court of Appeal the issue for the Court of Appeal is whether or not the injunction should have been granted or refused.

38. In this case there is the unusual fact that Mr Justice Inoke found the limitation action to be an abuse of process. He therefore dismissed the summons and the writ and headed his judgment as interlocutory. I repeat what I have said about this above. In my opinion it would not serve the ends of justice in this case if the Court of Appeal were confined to the abuse of process issue given that in

respect of an abuse of process issue it would have to consider and adjudicate upon the important issues of law outlined above. There is also the fact that there was no oral evidence in the High Court and there is not likely to be oral evidence in the Court of Appeal. The Court of Appeal is as able as the High Court to draw inferences of fact from affidavits and documents. The principal task for the Court of Appeal is deciding important issues of law. In this appeal the important issues are legal issues.

39. On account of these reasons the Court of Appeal should proceed in this case as it does in a general appeal from a final decision of the High Court. That is there should be an appeal by way of re-hearing. In relation to its process the Court of Appeal has all the powers of the High Court in respect of orders that it may make whatever it decides in this case. Given what has happened so far it would be unjust to the parties as well as giving rise to unnecessary further costs for the parties were the matter to be sent back to the High Court.

40. I make the following orders :

(1) Leave to appeal to the Court of Appeal granted to the applicant South Seas Cruises Limited.

(2) Stay ordered on the judgment of indemnity costs of F$10,000 awarded against South Seas Cruises Limited in the High Court until the final judgment of the Court of Appeal.

(3) The costs of this application be costs in the appeal.

(4) The appellant, South Seas Cruises Limited have 21 days in which to file its Notice of Appeal.

DATED at Suva this 26th day of August 2010.

William R. Marshall
Resident Justice of Appeal