IN THE SUPREME COURT OF FIJI

Civil Appeal No. CBV 06 of 2022

Petition for Special Leave to Appeal from the Court of Appeal Civil Appeal No. ABU 24 of 2022 (High Court Civil Action No. HBM 57 of 2022).

BETWEEN : **MILLEMARIN INVESTMENTS LTD** having its address of service at Haniff Tuitoga, 12 Vesi Street, Flagstaff.

Petitioner

A N D : **THE DIRECTOR OF PUBLIC PROSECUTIONS** of 25 Gladstone Road, Suva, Fiji.

First Respondent

A N D : **SULEIMAN ABUSAIDOVICH KERIMOV**.

Second Respondent

PETITIONER'S SUBMISSION

I. Introduction

1. The Petitioner Millemarin Investments Ltd. (**"Millemarin"**), the owner of the Motor Yacht AMADEA with International Maritime Organization No. 1012531, by its Petition dated 30 May 2022 has applied for special leave of this Court to appeal the judgment of the Court of Appeal dated 27 May 2022.

2. The proposed appeal here raises fundamental issues as to the nature and extent of Fiji's judicial powers and obligations in assisting a foreign state's requests for the seizure of property that is located in Fiji under the Mutual Assistance in Criminal Matters Act (**"MACMA"**). Should the Court grant leave to appeal, Millemarin respectfully requests that this Court find that the High Court and the Court of Appeal erred (and violated the MACMA) by permitting American authorities to seize and remove property from Fiji's

jurisdiction, which went beyond what was permissible under Fiji law. Specifically, the lower courts ruled that the AMADEA could be seized and sailed to the United States when under the law the courts were only permitted to restrain the asset as if it were a restraining order made under the Proceeds of Crime Act 1997. This Court should set aside the High Court and the Court of Appeal judgment that permitted the U.S. authorities to seize the AMADEA upon a finding that such ruling was in violation of MACMA.

3. This case arises from the United States' 13 April 2022 request for assistance (**"the U.S. Request"**) from the Republic of Fiji, and the Affidavit of Timothy J. Bergen submitted in support thereof (**"the Bergen** Affidavit"), to enforce a seizure warrant issued in the United States for the AMADEA, a 104-meter motor yacht worth approximately FJ$500 million. At the time of the U.S. Request, the AMADEA was berthed in Lautoka, Fiji. By their request, the U.S. sought not merely a restraint of the vessel in Fiji, but to actually take possession of the vessel and sail it away from Fiji to the U.S. without a forfeiture order, in violation of Fiji law and the treaty upon which the U.S. relied in making their request.

For the US Request: Appeal Record Volume 4-4 at page 1554
For Bergen Affidavit: Appeal Record Volume 4-4 at page 1443

4. The background to the U.S. Request was the Russian invasion of Ukraine. On 1 March 2022, the U.S. President, Joseph R. Biden, Jr., told the public that he intended to seize assets of Russian oligarchs as part of the U.S.'s response to the war in Ukraine.**[https://www.whitehouse.gov/state-of-the-union-2022/] [Tab 1].** On 2 March 2022, the U.S. Department of Justice announced the creation of the KleptoCapture Task Force, whose mission was in part to seize assets of certain Russian oligarchs who have been accused of wrongdoing. **[https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force kleptocapture] [Tab 2].**

5. The U.S.'s claimed basis for the AMADEA's seizure was that the AMADEA was owned by a sanctioned individual named Suleiman Kerimov, and therefore payments made in the U.S. or in U.S. dollars on the AMADEA's

behalf constituted sanctions violations. In fact, when the Director of Public Prosecutions (**"DPP"**), the First Respondent here, filed the matter in the High Court seeking to register and enforce the American seizure warrant, he only named Mr. Kerimov as a Respondent. Petitioner Millemarin filed a joinder application in the High Court to join the action, as Millemarin is the actual owner of the AMADEA, and is beneficially owned by Eduard Khudaynatov—who is not sanctioned in the U.S. Mr. Kerimov has never appeared in this action—having no interest in Millemarin or the AMADEA.

6. The DPP was incorrect in naming Mr. Kerimov as the Respondent. A review of the U.S. Request and the Bergen Affidavit makes clear that the U.S.'s "evidence" that Mr. Kerimov owns the AMADEA is woefully inadequate. In fact, there is no documentary evidence supporting that conclusion. Further, there is no evidence whatsoever linking Mr. Kerimov to any of the payments the U.S. claims constituted sanctions violations. To the contrary, the only conclusive documentary evidence regarding the AMADEA's ownership proves that it is owned by Petitioner Millemarin, whose ultimate beneficial owner is Eduard Khudaynatov.

7. Of import here, Mr. Khudaynatov has ***not*** been sanctioned by the U.S., and as the ultimate beneficial owner of the AMADEA, he was ultimately responsible for making payments on its behalf through Millemarin. All of the invoices and payments listed as alleged sanctions violations in the U.S. Request and the Bergen Affidavit were either directed to and/or made by Millemarin, whose undisputed ultimate beneficial owner is Mr. Khudaynatov, and as such did not constitute sanctions violations. The unrebutted evidence proving that Mr. Khudaynatov is the ultimate beneficial owner of the AMADEA was put before both the High Court and the Court of Appeal. Indeed, Mr. Kerimov has never appeared in any of the Fiji litigations, nor has he appeared in the United States (or any other jurisdiction) to claim ownership of the AMADEA. Nor has any evidence been introduced to refute the substantial evidence that Mr. Khudaynatov, rather than Mr. Kerimov, is the ultimate beneficial owner of the AMADEA.

8. Without reviewing any of the evidence submitted by the U.S. or the evidence put forth by Petitioner, the High Court of Fiji ordered the seizure warrant to be registered and enforced as if it were a domestic restraining

order, noting that the U.S.'s request was explicitly made "as a preliminary step to forfeiture under U.S. law." **[High Court Judgment paras 35, 48; see U.S. Request, pp. 2, 12]**. The Court of Appeal subsequently upheld the High Court's decision, thereby causing irrefutable harm to Mr. Khudaynatov and setting a dangerous precedent: permitting a foreign nation to seize property located in Fiji and take it away from Fiji without a forfeiture order and without any review of the underlying facts supporting the request for seizure, in violation of Fiji law.

High Court Judgment: Appeal Record Volume 1-4 at pages 13 to 20

9. That is what precisely came to pass. Shortly after the Court of Appeal's ruling, U.S. authorities boarded the AMADEA, took possession of the vessel from the Fijian authorities, brought in their own crew, and sailed it to San Diego, California, where it has been ever since under the seemingly inadequate care of the U.S. government.[1] The United States has not sought to forfeit the vessel, nor has it provided its owner any due process since seizing the vessel over a year ago.

10. The U.S. asserted in their request that the seizure warrant was a preliminary first step to forfeiture. **[U.S. Request p. 2 at Appeal Record Volume 4-4 at page 1555]** That statement was intentionally misleading. Under U.S. law, seizure is not a required preliminary first step to forfeiture. Indeed, under U.S. law, the government is not required to possess the property before filing a forfeiture action. *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002) [**Tab 3**]:"the seizure and forfeiture of property are two distinct events under the federal civil forfeiture laws...if the claimant in a federal civil forfeiture action properly raises the issue of the government's probable cause for seizure before the forfeiture trial...the property may be returned to the claimant **until the forfeiture trial is held**." (emphasis added); *see also Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119 (2d Cir. 1993)

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[1] As demonstrated in the Affidavits of Michael Zerr, the former Captain of the AMADEA, and Brendan McCarthy, the former Chief Engineer of the AMADEA **(INCLUDE REFERENCES TO THE APPELLATE RECORD)**, the AMADEA is a highly complex motor yacht that requires specialized product knowledge for its sophisticated systems, and costs approximately $1 million USD monthly to maintain to proper standards and in compliance with safety requirements. Petitioner understands that the AMADEA has been docked in San Diego for nearly the past year and maintained in a manner below the required maritime standards, which is causing significant safety risks and depreciation. Had the vessel remained frozen in Fiji, Mr. Khudaynatov advised the court that he would have undertaken "to continue paying for crew wages, upkeep and maintenance of [the AMADEA] and all Fiji Government charges while [his] appeal is in process."
For Zerr Affidavit: Appeal Record Volume 3-4 at pages 707 – 769
For McCarthy Affidavit: Appeal Record Volume 3-4 at pages 770 to 943
For Khudaynatov Affidavit: Appeal Record Volume 3-4 at pages 705 - 706

[**Tab 4**]:"[t]here is no support for the government's contention that it is entitled to retain the illegally seized property until a forfeiture trial ... [o]ther courts in this circuit have ordered the return of the seized property before the commencement of a forfeiture trial on the ground that the government lacked probable cause to seize the property at the time of the seizure."). The U.S. also informed Fiji in their request that they "intend to bring a non-conviction-based civil *in* rem forfeiture action related to the AMADEA." **[U.S. Request p. 12 at Appeal Record Volume 4-4 at page 1565].** Further and in any event, the DPP filed proceedings under Section 31(2) of MACMA to enforce a foreign restraining order as opposed to Section 31(1) of MACMA, which relates to the enforcement of a foreign forfeiture order. Almost a year has passed, and the U.S. has not filed any action to obtain a forfeiture order, calling into question whether they have sufficient evidence to seek such an order, and thus calling into question the basis upon which the U.S. obtained the seizure warrant and sought Fiji's assistance. In fact, as demonstrated below, much of the factual basis submitted by the U.S. for their seizure warrant is either irrelevant to the issue of ownership or, contrary to the U.S. assertions, proves ownership by *Mr. Khudaynatov*.

11. In accordance with Fiji law, the High Court and the Court of Appeal should have reviewed the underlying basis for the U.S. Request. At most, the courts below should have ordered the restraint of the vessel AMADEA in Fiji and permitted the owner to pay for its maintenance and care, while the U.S. sought a forfeiture order in the U.S. courts. If the U.S. were successful in obtaining a forfeiture order, the U.S. could have then sought Fiji's assistance again – with a forfeiture order in hand – to actually take possession of the vessel and sail it out of Fiji. However, in contrast to this well-established procedure, and in violation of MACMA, the court simply authorized seizure of the vessel with no factual review, no factual findings, no statement regarding the basis for its decision to exercise its discretion, and no U.S. forfeiture order. In fact, the U.S. still has not sought a forfeiture order in the U.S. court, 11 months after the Court of Appeal permitted the U.S. to take the vessel from Fiji to the U.S. because the U.S. is not in possession of sufficient evidence establishing that that the vessel is owned by a sanctioned individual and, in fact, is in possession of evidence establishing that it is owned by a non-sanctioned individual; as such, there is no basis under U.S. law under which to forfeit the vessel.

12. In Part II, below, Petitioner argues that this Court should grant special leave to appeal the Court of Appeal's judgment because all of the criteria that permit special leave are present in this matter. In Part III, Petitioner sets forth the procedural history of this matter. In Part IV, petitioner provides a summary of the U.S. Request and the Bergen Affidavit. Part V contains a statement of pertinent facts, which outlines the documents that conclusively prove that Mr. Khudaynatov is the ultimate beneficial owner of the AMADEA. Assuming that this Court will grant special leave in this matter, in Part VI Petitioner puts forth the substantive legal arguments demonstrating that the High Court and the Court of Appeal erred by permitting American authorities to seize and remove property from Fiji's jurisdiction, as follows:

1. **MACMA only permits restraints and forfeitures, and not seizures, and thus the Courts here Should Not Have Permitted the U.S. seizure of the AMADEA.**

2. **MACMA gives the Court discretion as to whether it should register a foreign order, and that exercise of discretion should include reviewing the underlying basis of the foreign order not merely rubber stamping it.**

3. **Had the Court reviewed the underlying basis for the Seizure Warrant, it would have found the factual basis woefully inadequate, and denied the U.S.'s Request.**

13. Petitioner concludes by requesting that this Court set aside the High Court and the Court of Appeal judgment that permitted the U.S. authorities to seize the AMADEA because this ruling was in violation of MACMA.

II. This Court should grant special leave because this is a matter of public and legal importance involving a serious issue of Fiji law, likely to be repeated, and a FJ$500 million asset which is now wasting in value as a result of the erroneous orders of the Courts below.

14. The criteria for the grant of special leave to appeal to the Supreme Court are governed by Section 7(3) of the Supreme Court Act, 1998. That Act

states that in civil matters, the Supreme Court "must not grant special leave to appeal unless the case raises:

(a) A far-reaching question in law;
(b) A matter of great general or public importance;
(c) A matter that is otherwise of substantial general interest to the administration of civil justice."

15. In *Lal v New India Assurance Company Ltd* Civil Appeal No. CBV 0003 of 2013 [**Tab 5**], the threshold for the granting of leave was formulated as follows:

> [12] The threshold for the granting of special leave to appeal is high as has been expounded in the cases which have dealt with this provision. Bulu –v- Housing Authority [2005] FJSC 1 CBV0011.2004S (8 April 20005), Dr. Ganesh Chand –v- Fiji Times Ltd. CBV 0005 of 2009 (31st March 2011), Praveen's BP Service Station –v- Fiji Gas Ltd., DAV0001 of 2011 (6th April 2011) Native Land Traust Board –v- Shanti Lal and Several Others CBV0009 of 2011 (25th April 2012) were cases where the Supreme Court dealt with this provision. According to these decisions special leave to appeal is not granted as a matter of course, and that for a grant of special leave, the case has to be 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.

16. This case raises a far-reaching question in law, is a matter of great public importance, affects property of considerable value (approximately FJ$500 million), and is of substantial general interest to the administration of civil justice, pursuant to Section 7(3) of the Supreme Court Act 1998.

17. In this case, a U.S. Court – the United States District Court for the District of Columbia – issued an ex parte warrant for seizure of the AMADEA. The

High Court, on the DPP's application, ordered the registration and enforcement of that seizure warrant under the MACMA for enforcement as if it were a domestic restraining order—which it is not. The Court of Appeal then upheld the High Court's decision without any substantive review of the basis underlying the seizure request. Thereafter, the Fijian authorities handed over possession of the AMADEA to the U.S. authorities, permitting them to sail the vessel out of the jurisdiction of Fiji to the jurisdiction of the United States. The Petitioner respectfully submits that such registration was not lawful, particularly under the MACMA.

18. The appeal raises novel and important legal issues:

(a) Can a foreign state's *in rem* seizure warrant be registered and enforced as a foreign restraining order with respect to property located in Fiji, particularly when the MACMA only speaks of "freezes" or "restraints" and "forfeitures," but not seizures? The Petitioner says not.

(b) If so, is the decision to register and enforce a foreign seizure warrant within the discretion of the court, and on what grounds is any such discretion to be exercised? The Petitioner says discretion can only be exercised in accordance with the provisions of the MACMA and the Proceeds of Crime Act, which only permit freezes/restraints and forfeitures of tainted property—but not seizures. The Petitioner says that both the High Court and the Court of Appeal failed to consider the threshold requirements of the MACMA and the Proceeds of Crime Act. The Director of Public Prosecutions v. Suleiman Abusaidovich Kerimov High Court Civil Action No. HBM 57 of 2022 at [32].

(c) Even if the Court were to determine that foreign seizure orders can be registered and enforced under the MACMA, must the Court analyze whether the property constitutes tainted property under the Proceeds of Crime Act or may the Court permit a seizure of property without providing the owner of such property any due process rights? The Petitioner says yes, the court must make such an

analysis and provide the property owner of some due process prior to seizing property.

19. The issues presented in this appeal are matters of great general or public importance and of substantial general interest to the administration of civil justice.

(a) The question of whether a foreign order for **seizure** can be registered and enforced as if it were a domestic **restraining order** has produced contrary decisions in other jurisdictions with legislation similar to the MACMA: Australia and New Zealand. Australia, however, has enacted legislation on the issue that is materially different than Fiji's MACMA. There is no binding precedent on the question in Fiji.

(b) This case presents an opportunity for the Court to set a precedent that complies with Fiji law and protects the rights of Fijians and all persons whose property is located in Fiji, particularly given that a foreign state could request the seizure of a Fijian citizen's property in the future. This Court has the opportunity to set forth the proper legal analysis or procedure for Fiji courts to follow when presented with a foreign state's request for assistance. Indeed, the Court of Appeal recognized that the issues raised in this matter are not covered by binding authoritative precedent, and that this appeal puts the Supreme Court "*in a position to lay down a binding precedent on the issue contained in the present dispute.*"

Court of Appeal Judgment: Supreme Court Record at paragraph 32 at page 62

(c) The High Court and the Court of Appeal permitted a foreign state to seize the Petitioner's property – a vessel estimated to be worth approximately FJ$500 million – from the jurisdiction of Fiji without a forfeiture order from the foreign state. As a result, Mr. Khudaynatov has suffered a grave injustice, as his property is under the substandard care of the U.S. and is depreciating as a result of the U.S. government's failure to properly maintain the asset while under

its care and obligation. These circumstances may render the Republic of Fiji and the courts subject to liability to Petitioner for the deterioration and depreciation of this significant asset.

20. While this Court need only find that this case raises one of the specified concerns, as demonstrated above, they are *all* present in this matter. Therefore, the Court should grant special leave to hear this appeal.

III. Procedural History

21. On 1 April 2022, the U.S. submitted a request for assistance to the Republic of Fiji "seeking interviews and documents (original request)." **(Supplemental Request, p. 2).** That original request has not been released publicly and Petitioner does not have a copy of it.

22. On 12 April 2022, the AMADEA berthed/anchored at Lautoka Wharf, Lautoka, Fiji.

23. On 12 April 2022, the FBI and Fijian authorities conducted interviews of five crew members from the AMADEA in Fiji: Captain Michael Zerr, Purser Cobie Janse van Rensburg, Chief Officer Lorin McFadden, OOW Mark Millar, and Chief of Security Scott Fairey. During the interview of Captain Michael Zerr, Captain Zerr provided to Fijian police officer Alan Nair the documents demonstrating Mr. Khudaynatov's ownership of the AMADEA, which are detailed below.

24. On or about 12-13 April 2022, the FBI and other authorities interviewed three additional crew members of the AMADEA at Los Angeles International Airport (**"LAX"**): Captain John Walsh, Chief of Security Martyn Messenger, and Chief Officer Christopher Davey. After these individuals failed to identify Mr. Kerimov as the owner of the AMADEA, their visas to enter the U.S were revoked by the U.S. law enforcement officers who interviewed them asserted that their refusal to name Mr. Kerimov as the owner of the vessel constituted a material misstatement of fact.

25. On 13 April 2022, U.S. Magistrate Judge G. Michael Harvey of the United States District Court for the District of Columbia issued a warrant to seize

the AMADEA ("the Seizure Warrant"). Special Agent Timothy Bergen of the Federal Bureau of Investigation ("SA Bergen") submitted an affidavit in support of the U.S.'s application for that warrant under caption *In the Matter of the Seizure of THE MOTOR YACHT AMADEA, WITH INTERATIONAL MARITIME ORGANIZATION NUMBER 1012531*, Case No. 22-sz-9. That application was substantially similar to the Bergen Affidavit that was submitted here in Fiji days later.

For Seizure Warrant see Appeal Record Volume 4-4 at page 1570

26. On 13 April 2022, the U.S. sent an "**URGENT** Supplemental Request for Assistance in the Investigation of" Mr. Kerimov to the "Central Authority for the Republic of Fiji," referencing DOJ No. CRM-182-82816 (previously defined as the "U.S. Request"). That request was made pursuant to Articles 13 and 18 of the United Nations Convention against Transnational Organized Crime ("UNTOC"). Specifically, the U.S. made the request "for the purpose of investigating and prosecuting conduct required to be criminalized under the UNTOC, namely, participation in an organized criminal group and conspiracy to commit a serious offense to obtain a financial benefit and to launder the proceeds of crime, under Articles 5 and 6 of the UNTOC."[2] The U.S. based its request on a "belief" that Mr. Kerimov, a sanctioned individual, owned the AMADEA and violated sanctions by causing payments on its behalf through U.S. financial institutions. **[pp. 1-2 of the US Request]** In particular, the U.S. requested that the Fijian authorities give effect to the U.S.-issued seizure warrant "to restrain the MY Amadea" in order "to prevent its transfer, sale, or other encumbrance or dissipation, as a preliminary step to forfeiture under U.S. law," and to serve notice of the warrant on the AMADEA.[3] **[p. 2 of the US Request].**

27. On 15 April 2022, search warrants that were issued in Fiji on 12 April 2022 for certain documents on board the AMADEA were executed.

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[2] In making its request, the U.S. failed to meet the fundamental requirements of these Articles. The U.S. alleged no facts supporting the existence of an "organized criminal group" as defined in the UNTOC. The U.S. also failed to sufficiently allege facts constituting a serious crime, as no evidence was put forth linking any supposed payments to Mr. Kerimov, as discussed further herein.

[3] In fact, however, the avowed intention of the U.S. authorities was to seize and take possession of the AMADEA in Fiji, and to sail the vessel out of the jurisdiction of the Courts of Fiji and into the jurisdiction of the U.S. This U.S. explicitly stated as such in the U.S. Request when offering to pay for the maintenance of the AMADEA in Fiji and/or to make "any arrangements necessary to transport the Amadea into U.S custody."

28. On 19 April 2022, the DPP filed an Originating Summons in the High Court of Fiji to apply for the registration and enforcement of the Seizure Warrant pursuant to MACMA Sections 31((2), (3), and (6). When the DPP first filed its Originating Summons, the parties to the action were only the DPP and Mr. Suleiman Abusaidovich Kerimov.

29. On 19 April 2022, the High Court granted an interim restraining order *ex-parte* against the AMADEA "until the finalization of the application to register a warrant to seize yacht Amadea" and adjourned the matter for further directives until 21 April 2022.

For Interim Order see Record Volume 4-4 at page 1582

30. On 21 April 2022, Petitioner's Counsel appeared before the High Court and sought that the Petitioner Millemarin, being the registered owner of AMADEA, be joined as a party to the action. Petitioner's counsel was hired by Millemarin's ultimate beneficial owner, Eduard Khudaynatov. The High Court ordered the DPP to file and serve an Amended Originating Summons joining Petitioner Millemarin as a party to the proceeding. The DPP did so on the afternoon of 21 April 2022. Petitioner Millemarin filed and served an acknowledgment of service on 22 April 2022. On 21 April 2022, the High Court also set timetables for the filing of evidence. It ordered the Petitioner to file its affidavits in response by 9:00 a.m. on Monday, 25 April 2022. This gave the Petitioner effectively one and half working days to file its evidence. The High Court also set a hearing date on the Amended Originating Summons for Monday, 25 April 2022 at 11:30 a.m. At the conclusion of the hearing, the matter was adjourned for ruling on Tuesday, 3 May 2022.

Amended Originating Summons: Appeal Record Volume 4-4 at page 1549

31. On 22 April 2022, SA Bergen submitted the Bergen Affidavit to the High Court of Fiji, as part of the DPP's application to restrain the AMADEA based on the U.S.'s request that the seizure warrant be enforced in Fiji. This affidavit was substantially similar to the one filed in the U.S., and is summarized for purposes of this appeal below in Part IV and discussed in detail in pages 41-51.

For Bergen Affidavit: Appeal Record Volume 4-4 at pages 1443 to 1546

High Court Judgment –Appeal Record Volume 1-4 at page 13

32. The Judgment of the High Court (Justice Deepthi Amaratunga) was delivered at approximately 4:00 p.m. on Tuesday, 3 May 2022, granting the DPP's application and ordering the registration of the American seizure warrant pursuant to Section 33(3) of the MACMA, and assessing costs of $3,000 to be paid by Petitioner Millemarin to the DPP within 30 days. In his Judgment, Justice Amaratunga:

(a) Noted that Sections 31(2) and 31(3) of MACMA only allow the registration of a foreign restraining order. See paragraph 19 of the High Court judgment;

(b) Correctly identified that the first step was to determine if the Seizure Warrant at issue here was a foreign restraining order under MACMA, as "the jurisdiction of this Court is confined to registration of a foreign order under MACMA." See paragraphs 21-23 of the High Court judgment;

(c) Concluded that the Seizure Warrant at issue here meets the definition of a foreign restraining order under Section 3 of the MACMA, in that it was "issued under foreign law for seizure which is a restraint on Amadea" and was made "'as a preliminary step to forfeiture under U.S. law.'" See paragraphs 31-38 of the High Court judgment (quoting the U.S. Request);

(d) Determined that the Seizure Warrant was issued in relation to a "serious offence" as required by MACMA Section 31(3), in that it alleged money laundering, which is a serious offence in Fiji that is punishable by up to 20 years imprisonment. See paragraphs 39-45 of the High Court judgment.

(e) Found that the last requirement – that the restraining property must be in Fiji – was satisfied, given that the AMADEA was berthed in the Lautoka wharf. See paragraphs 46-47 of the High Court judgment.

(f) Recognized that courts have discretion in deciding whether to register foreign orders, as the "procedure for the registration has not been spelt out in the legislation and the registration of orders under Section 31(3) of the MACMA is not mandatory." See paragraph 24 of the High Court judgment.

(g) Limited the court's discretion by stating that such discretion "cannot be expanded to inquiry as to original jurisdiction of court exercised in forfeiture or restraint order Proceeds of Crime Act 1997 as argued by Respondent." See paragraph 24 of the High Court judgment.

(h) Concluded that the Seizure warrant permitted the U.S. authorities to seize the vessel and sail it out of Fiji jurisdiction to the United States. See Final Orders of the High Court judgment at Appeal Record Volume 1-4 at page 20.

33. On 4 May 2022, Petitioner Millemarin filed an appeal to the Court of Appeal. The Petitioner also filed an application to stay the execution/enforcement of the High Court Judgment of 4 May 2022 until the hearing and determination of the Petitioner's appeal to the Court of Appeal.

For High Court Stay Judgment: Appeal Record Volume 2-4 at page 387

34. Also on 4 May 2022, the DPP Counsel in open Court confirmed their understanding that *"the boat will most likely be moved sometimes this weekend."*

35. On Thursday, 5 May 2022, officials from the U.S. Marshal Service, the FBI, U.S. Coast Guard and others boarded the AMADEA with the avowed intention of procuring the sailing and transfer of the AMADEA to the U.S. under their possession and control, and to sail the vessel that weekend to the U.S.

36. On Friday, 6 May 2022, the High Court refused to stay the execution/enforcement of the Judgment of the High Court. That same day, Petitioner Millemarin renewed its application for a stay of execution/enforcement of the High Court Judgment in the Court of Appeal.

In the evening of Friday, 6 May 2022, a single Justice of Appeal – Dr. Justice Almeida Guneratne – ordered that the AMADEA be restrained from leaving Fiji until the hearing and determination of the Petitioner's appeal to the Court of Appeal.

For High Court Stay Judgment: Appeal Record Volume 2-4 at page 387
For Court of Appeal Stay Order: Appeal Record Volume 2-4 at page 384

37. As it had from the start, this matter inexplicably progressed at an unusually quick pace. It is difficult to understand why so important a matter had been so expedited once the boat was prevented from leaving Fiji waters under Fiji law.

38. The Petitioner's Appeal before the Court of Appeal was heard on 18 May 2022.

Court of Appeal Judgment

39. The Court of Appeal delivered its judgment on 27 May 2022 wherein it upheld the judgment of the High Court. The Court of Appeal however stayed the decision for seven days on the basis that *"opportunity be given to the Appellant to test the judgments of both the High Court and this Court, so that, the Supreme Court (being the apex Court of the Country) would be in a better position to lay down a binding precedent on the issues contained in the present dispute. The Court found that application (made in open Court by the Petitioner's/Appellant's Counsel) as being reasonable and once carrying jurisprudential propensity."* See paragraphs 32-33. In upholding the High Court's judgment, the Court of Appeal:

(a) Declined to review the underlying basis for the Seizure Warrant, stating that it was not the function of a Fiji Court to question the evidence obtained in support of the application to register a foreign restraining order, as doing so "would reduce to a dead letter mutual obligations contemplated by the legal instruments which the learned Judge took note of." See paragraphs 14-16;

(b) Concluded that even though the Seizure Warrant was not called a restraining order on its face, it nonetheless met the definition of a foreign restraining order, particularly when reviewed in light of the "well established principles of interpretation on international treaties" that allow for broad interpretations to be applied given that different nations often use different terminology for the same concept. See paragraphs 17-25; and

(c) Concluded that the High Court did not commit error when limiting the jurisdictional review of foreign orders. See paragraphs 28-30.

Court of Appeal Judgment: Supreme Court Record at paragraph 32 at page 62

40. On 30 May 2022, Petitioner filed the present Petition in the Supreme Court. At the same time, Petitioner filed an application to stay execution/enforcement of the Court of Appeal Judgment of 27 May 2022 until the hearing and determination of the Petitioner's appeal to the Supreme Court. Petitioner Millemarin made this application to effectively stop the AMADEA from being removed from the jurisdiction until the hearing and determination of the Petitioner's appeal to the Supreme Court.

Supreme Court Petition: Supreme Court Record at pages 1-12

41. On 2 June 2022, Petitioner's application for a stay pending appeal to the Supreme Court was heard by the Chief Justice and President of the Supreme Court (now suspended).

42. On 7 June 2022, Justice Kumar denied the Petitioner's application for a stay pending an appeal to the Supreme Court holding that "if stay is not granted, the Appeal if successful will be rendered nugatory" but "public interest dictates that stay be refused and yacht sail out of Fiji waters." In so ruling, Justice Kumar accepted the bald unsupported assertion from the bar table that the AMADEA being in Fiji *"is costing the Fijian Government dearly in terms of its resources. The fact that US Authorities have undertaken to pay cost incurred by the Fijian Government is irrelevant. Fijian Government resources could be utilized elsewhere more meaningfully rather than*

utilizing it in respect to a vessel which sailed into Fiji waters without a permit and most probably to evade prosecution by United States of America. Public interest demands that the Yacht which has no interest in Fiji should sail out of Fiji to avoid wastage of more valuable resources on it."^ However, there was no evidence put before the Court of any costs incurred by the Fijian Government in connection with the AMADEA. Nor was or is there any evidence that the AMADEA was sailed into Fiji to evade anyone, let alone the United States, particularly given that its owner was not sanctioned. The evidence actually shows that the vessel was on its way to the Philippines for five weeks of planned maintenance and service, and made a natural stop in Fiji along the way.

43. Shortly after Chief Justice Kumar denied Petitioner's application for a stay pending its appeal to the Supreme Court, the AMADEA was sailed out of Fiji by American Authorities consisting of the FBI, Federal Marshals, and a U.S.-installed crew, accompanied and shadowed by a large U.S. Coast Guard vessel to the United States of America.

44. The AMADEA is now berthed in San Diego, California. The U.S. has not filed any action seeking forfeiture of the AMADEA.

IV. Summary of the U.S. Request and Bergen Affidavit

45. The U.S. based its application to seize the AMADEA on the incorrect belief that Suleiman Kerimov, an individual sanctioned by the U.S. since 2018, owned the AMADEA. Thus, the legal bases for the application were alleged sanctions violations by Mr. Kerimov pursuant to 50 U.S.C. § 1705(a) (**"IEEPA"**), and money laundering and money laundering conspiracy pursuant to 18 U.S.C. §§ 1956(a)(2) & (h). Accordingly, SA Bergen alleged that there was probable cause to believe that Mr. Kerimov, while owning the AMADEA, made payments in U.S. dollars on behalf of the AMADEA and caused such payments to be sent through U.S. financial institutions without the required license for sanctioned individuals to conduct such transactions, in violation of IEEPA and other U.S. federal laws. **[Bergen Affidavit pp 2, 17 at Appeal Record Volume 4-4 at 1443]** SA Bergen then concluded that there was "probable cause to believe that the AMADEA" was "subject to seizure and forfeiture," where the property was either "'involved in'" a

money laundering transaction under § 1956 or "'constitutes' 'proceeds traceable' to sanctions violations under IEEPA. **[Bergen Affidavit p 3]**

46. The bases cited by SA Bergen to support the belief that Mr. Kerimov owns the AMADEA do not even suggest, let alone prove ownership. **[Bergen Affidavit Part III(C)].**

47. As discussed in more detail in Legal Argument 3 pg. 41-51 the Bergen Affidavit was filled with materially false and misleading statements. Even taking them at face value, however, should have precluded the High Court and Court of Appeal from finding there was a sufficient factual and legal basis to register a restraining order under Section 31(2) and (6) of MACMA.

V. Statement Of Facts

48. Mr. Khudaynatov has owned the AMADEA since he commissioned the building of it in 2012. At that time, Mr. Khudaynatov and his partners created an entity called Nereo Management Limited ("Nereo") to serve as the buyer of the AMADEA in the shipbuilding contract. His partners were from Imperial Yachts (with no connection to Mr. Kerimov), the yacht brokerage and management company that represented Mr. Khudaynatov throughout the building of the AMADEA and that was retained to manage and sell the yacht on his behalf upon completion. When construction of the AMADEA was completed, and the vessel was finally delivered in 2017, Mr. Khudaynatov retained control of Nereo, the AMADEA's legal owner as an option holder of Nereo, which permitted him to purchase all of the shares of Nereo at any time upon demand. With the option structure, Mr. Khudaynatov held the same rights as an ultimate beneficial owner.

49. Mr. Khudaynatov intended to sell the AMADEA shortly after it was completed. However, attempts to sell over the next few years were unsuccessful and hampered by the COVID-19 pandemic. As a result, during the summer of 2021, Mr. Khudaynatov decided to take the vessel off the market and charter it to long-term charter guests. Because of this change in strategy, he transferred the ownership of the AMADEA from Nereo, an entity that included his partners, to Millemarin, which did not include his partners and of which he was the sole ultimate beneficial owner.

This transfer took place in August 2021, which is when the U.S. claims the AMADEA was sold to Mr. Kerimov. However, this "sale" was in fact a transfer from one entity to another of which Mr. Khudaynatov remained the ultimate beneficial owner. There was never a sale to an independent third party.

50. The unchallenged documentary evidence before the Court is that the registered owner of the AMADEA is Petitioner Millemarin. The only question then is who is the ultimate beneficial owner of Millemarin. All the documentary evidence establishes that the ultimate beneficial owner of Millemarin is Mr. Khudaynatov. These documents, which were provided to authorities by the AMADEA's Captain on or about 13 April 2022, demonstrate the following:

(a) The registered owner of the AMADEA is Petitioner Millemarin Investments Ltd. of Carre Chambers, PO Box 260, Road Town, Tortola, British Virgin Islands.

(b) The parent company and the sole shareholder of Millemarin is Invest International Finance Ltd. ("IIF") of Carre Chambers, PO Box 260, Road Town, Tortola, British Virgin Islands. IIF was incorporated in January 2017.

(c) Stichting Energy Research Foundation ("Stichting") was created on February 2, 2017. Mr. Khudaynatov served as the sole certificate holder, meaning the owner, of Stichting. Stichting was the sole owner of IIF.

(d) At the time of the AMADEA's seizure, IIF and Millemarin were held within a trust that was created for Mr. Khudaynatov to hold certain of his assets, with the assistance of an outside consultant named Olga Kroon of Boltenko Law. This trust, the September Trust, was created under the law of England on December 20, 2019. Ms. Kroon's Trust, the Boltenko Trust AG, served as the trustee of the September Trust. Boltenko Trust AG is a public limited company registered in Freigutstrasse 8, Zurich, Canton Zurich, Switzerland.

(e) Mr. Khudaynatov served as the economic settlor and beneficiary of the September Trust. A trust settlor's role is to transfer an asset (here, Invest International Finance Ltd. and its subsidiary Millemarin, which holds the AMADEA) to a trustee (here, the Boltenko Trust) to manage that asset on behalf of a beneficiary. Mr. Khudaynatov served as the settlor of the September Trust through his ownership of Stichting, which was named as the legal settlor of the September Trust.

(f) Accordingly, Stichting transferred all of its assets, including IIF, to the September Trust. Upon that transfer, the sole shareholder of IIF became the Boltenko Trust AG, as the Trustee of the September Trust on Mr. Khudaynatov's behalf. Stichting was liquidated following that transfer.

(g) Millemarin Investments Ltd. was incorporated on 10 June 2021 by its 100% shareholder and parent company, IIF. At that time, IIF was part of the September Trust, and thus Millemarin also became part of the September Trust.

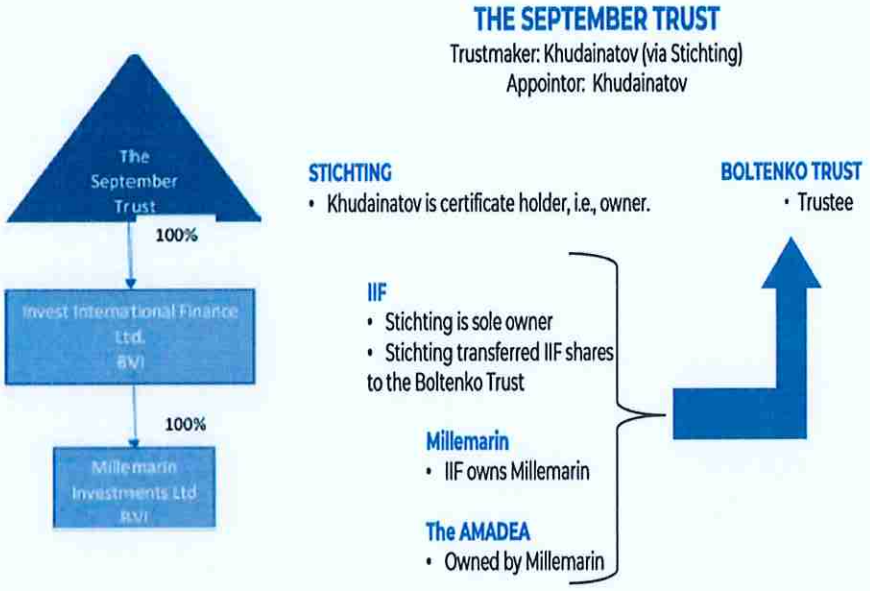
(h) The AMADEA was "purchased" by Millemarin in or about August 2021 by way of a sales and purchase agreement concluded with Nereo.

(i) The financing for the purchase of Amadea was provided to Millemarin by way of assumption by the latter of liability of the seller (Nereo) to Lionsbay Investments Limited, BVI.

See Appeal Record at Volume 4-4 at page 1037

51. Thus, the documents show that Millemarin was incorporated on June 10, 2021, and is owned by IIF. IIF was part of the September Trust and therefore so too was Millemarin on the day it was created. As seen on the Certificate of British Registry dated August 16, 2021, the sole owner of the AMADEA is Millemarin. At the time of its seizure, the AMADEA was part of the September Trust and Mr. Khudaynatov, as primary beneficiary of the

September Trust, owns the AMADEA. The diagram below sets forth the ownership structure of the AMADEA.



52. This ownership structure was devised with the advice of outside consultants as a way of optimizing Mr. Khudaynatov's family's wealth in full compliance with all applicable laws. Mr. Khudaynatov attested to his ownership of the AMADEA in a sworn affidavit that was submitted to the High Court and the Court of Appeal in this matter dated 2 May 2022, in which he unambiguously affirmed that he is the sole beneficial owner of the AMADEA. Affidavit of Eduard Khudaynatov filed in connection with The Director of Public Prosecutions v. Suleiman Abusaidovich Kerimov High Court Civil Action No. HBM 57 of 2022. In addition, a letter from Mr. Khudaynatov's outside advisor, Olga Kroon of Boltenko Law, attested to the ownership structure set forth above. For Kroon Statement See Appeal Record Volume 4-4 at pages 1039 to 1041

53. The documentary record proves that the transfer from Nereo to Millemarin was a transfer from one Khudaynatov entity to another, and not a sale to Mr. Kerimov. For example, the day Mr. Khudaynatov transferred the AMADEA from Nereo to Millemarin; Imperial Yachts sent a letter to Mr. Khudaynatov's Family Office to inform them that the re-registration from Nereo to Millemarin was complete. The email also said, "I will send you separately updated Management Agreement and Sale CA. Our Bank will require change to Millemarin to process payments of on-going operational

invoices." In other words, Imperial Yachts told Mr. Khudaynatov, on the day of the transfer, that *he* would be solely financially responsible for all invoices going forward. However, the U.S. mistakenly interpreted the transfer from Nereo to Millemarin as a sale from Mr. Khudaynatov to Mr. Kerimov, despite the fact that there is no documentary evidence suggesting this. **Bergen Aff. ¶ 27.** To the contrary, as of today, Mr. Khudaynatov still owns the AMADEA, and always has.

54. Moreover, there is simply no evidence that the vessel was sold to *any* third-party. Typically, in a sale of a yacht of the size and value of the AMADEA, the seller and buyer would both hire lawyers and other outside consultants to conduct thorough due diligence, which would last months. Divers would inspect below the waterline of the vessel. The vessel would be hoisted out of the water and "dry docked" for a comprehensive survey by the buyer. The final closing would likely be completed in international waters for taxation purposes. The new owner would likely replace the previous owner's crew with a new crew chosen by the new owner. But none of this took place with respect to the AMADEA. There was no due diligence, no underwater inspection, no dry dock survey, and no crew change. The reason for this is simple – the AMADEA was never sold. Rather, its formal ownership was transferred from one entity to another *while the UBO stayed the same.*

For Ownership Details of the MY Amadea see Appeal Record Volume 4-4 at pages 1037 – 1110.

VI. Substantive Legal Arguments

Petitioner's Position in Summary

55. As an initial matter, the government of a particular country may request legal assistance from a foreign state pursuant to a particular treaty. Here, the U.S. sought assistance from Fiji pursuant to the UNTOC. Upon receipt of such a request, Fiji is able to exercise its discretion in providing mutual legal assistance to foreign states pursuant to its own laws, here the MACMA. Importantly, the relief which may be given by the Courts in Fiji is constrained by the provisions of MACMA. An order made by a foreign court

and sought to be enforced in Fiji should not simply be embraced by the Courts in Fiji as if they were Fijian. Rather, Fiji—like any other country that insists on its own sovereignty—demands compliance with its own laws prior to acting at the request of a foreign state. The foreign court order must at a minimum be in conformity with the requirements of Fiji law. Every legal system has its own procedural values and safeguards: what may seem appropriate and proper to a foreign court is not necessarily appropriate and proper to the Courts of Fiji. Accordingly, if an application comes within both the spirit and the letter of MACMA, the Fiji Court can lend assistance. But a responsibility lies upon an applicant foreign state to present an order and request assistance that is in accordance not only with the governing treaty, but also the requested state's laws.

56. That did not happen here. The U.S.'s requests failed to comply with Fiji law. In its request, the U.S. asked Fiji "to give effect to a seizure warrant . . . to restrain the AMADEA to prevent its transfer, sale, or other encumbrance or dissipation, as a preliminary step to forfeiture under U.S. law." U.S. Request, p. 2. The U.S. also requested assistance with serving the notice of the seizure warrant on the AMADEA. The Seizure Warrant itself was entitled a "Warrant to Seize Property Subject to Forfeiture" and it commanded "any authorized law enforcement officer" in the District of Columbia in the United States (where the seizure warrant erroneously stated the vessel to be located) to execute the warrant and seize the AMADEA. It became clear as the case proceeded in the lower courts that the U.S. did not actually intend to obtain Fiji's assistance with "serving" the Seizure Warrant, but rather with permitting the U.S. to actually seize the AMADEA and remove it from Fiji's jurisdiction.

57. A seizure warrant issued in a foreign country of course provides no legal basis for action to be taken within Fiji's jurisdiction. Rather, seizure warrants, like the one here, however, are outside the realm of the governing treaty invoked by the U.S. in its request (the UNTOC) and specifically outside of the scope of Fiji's laws, the MACMA. Despite that, the High Court "rubber stamped" the U.S.'s Request without reviewing the underlying basis for requesting such a dramatic action. This Court should not let this dangerous precedent of permitting a foreign state to take property from the confines of Fiji without any meaningful review stand.

58. The Seizure Warrant and the DPP's request focused principally on the U.S.'s representation that the property was "subject to forfeiture." The DPP stated in paragraph 3 of the Shankar Affidavit that the U.S. Request was made "for the registration and enforcement of a warrant to seize property subject to forfeiture." The DPP then stated in paragraph 4 that "the request contains the warrant to seize property subject to forfeiture." In paragraph 5, the DPP stated that the "purpose of this request is to restrain the" AMADEA. Finally, in paragraph 7, the DPP stated that the "specific assistance sought is to restrain the AMADEA to prevent its transfer, sale or other encumbrance or dissipation as a preliminary step forfeiture under the laws of the [U.S.]." However, a year has passed and the U.S. has not applied to any U.S. court to obtain a forfeiture warrant for the AMADEA.
For Shankar Affidavit: Appeal Record at Volume 4-4 at pages 1551 - 1552

59. The seizing of the AMADEA by the U.S. authorities and subsequent sailing to the U.S. represented two significant practical and jurisdictional leaps.

(a) If the AMADEA were not sailed to the U.S., it would be more difficult to serve a U.S. action in rem upon the AMADEA. As such, the act of sailing the vessel to the U.S. would give the U.S. substantive jurisdiction where none would otherwise exist.

(b) The U.S. obtained this substantive jurisdictional advantage by invoking the assistance of Fiji's Courts in a manner not in compliance with MACMA. It is not the purpose of MACMA to expand and augment a foreign country's substantive legal processes. If property in Fiji is to be restrained by Fiji's legal system, that is surely to be done in compliance with Fiji law, by Fiji Courts that actually consider the underlying request rather than merely act as a rubber stamp. Hence the quintessentially domestic relief given by Section 31(6) of MACMA which provides: "A foreign restraining order registered in the Court under this section has effect, and may be enforced, as if it were a restraining order made by the Court under the Proceeds of Crime Act 1997 at the time of registration."

60. In this section, Petitioner submits that the High Court's order below for registration of the Seizure Warrant was made in error for several reasons:

(i) First, the MACMA (and the UNTOC) only speak to (1) restraining (or freezing) orders and (2) forfeiture orders. The U.S. Request was for permission to not only restrain the vessel, but also to enforce a seizure warrant issued in the U.S. court. Such action is outside the scope of the governing law and treaty. Neither MACMA nor UNTOC permit an asset seizure where it has not been the subject of a forfeiture order.

(ii) Second, MACMA gives the Court discretion as to whether it should register a foreign order, and that exercise of discretion should include reviewing the underlying basis of the foreign order.

(iii) Third, had the Court reviewed the underlying basis for the Seizure Warrant, it would have found the factual basis woefully inadequate, and denied the U.S.'s Request.

Relevant Legal Framework

61. The U.S. sought Fiji's assistance pursuant to the UNTOC, particularly Articles 13 and 18 **[Tab 6]**

(a) Article 13 speaks to international cooperation for purposes of *confiscation*, not *seizure*. Thus, Article 13 is inapplicable to the Seizure Warrant here. In any event, Article 13 states: "A state party that received a request from another State Party . . . *for confiscation of* . . . property . . . shall: (a) Submit the request to its competent authorities for the purposes of obtaining an order of confiscation, and if granted, give effect to it...." The Article continues that "Following a request by another State Party, the requested State Party shall take measure to identify, trace and freeze or seize [the property] for purposes of eventual confiscation to be ordered either by the requesting State Party of by the requested State Party." Notably, Article 13 provides that "the decisions or actions of this article shall be taken by the requested State Party in accordance

with its domestic law," and that "[c]cooperation may be refused by a State Party if the offence to which the request relates is not an offense covered by this Convention. Lastly, Article 13 states that the "the provisions of this article shall not be construed to prejudice the rights of bona fide third parties."

(b) Article 18, entitled "Mutual legal assistance," states in pertinent part that assistance "may be requested for any of the following purposes:

(c) . . . (c) executing searches and seizures, and freezing and (i) any other type of assistance that is not contrary to the domestic law of the requested State Party." If further provides that assistance "may be refused: (a) if the request is not made in conformity with the provisions of this article; . . . (c) if the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested . . ."

62. The MACMA is the Fiji law that governs how and when Fiji should provide legal assistance to a foreign state. The following provisions are relevant here.

(a) Section 3 of MACMA defines a foreign restraining order as "an order, made under the law of a foreign country, restraining a person, or persons, from dealing with property, being an order made in respect of an offence against the law of that foreign country."

(b) Section 31(2) of MACMA provides: "Where a foreign country requests the Attorney-General to make arrangements for the enforcement of **a foreign restraining order**, made in respect of a serious offence, against property that is believed to be located in Fiji, the Attorney-General may authorize the Director of Public Prosecutions, in writing, to apply for the registration of the order in the court."

(c) Section 31(3) of MACMA provides: "Where the Director of Public Prosecutions applies to the court for registration of a foreign order under this section, the court may register the order."

(d) Section 31(6) of MACMA provides: "A foreign restraining order registered in the Court under this section has effect, and may be enforced, as if it were a restraining order made by the Court under the Proceeds of Crime Act 1997 at the time of registration."

63. Section 19 b(1) is the relevant section of the Proceeds of Crime Act 1997 (**"PCA"**).

(a) Section 19b(1) provides that: "where the Director of Public Prosecutions applies to the Court for a restraining order against property and the court is satisfied that there are reasonable grounds for suspecting that the property is tainted property or terrorist property for which a forfeiture order may be made under section 19E or 19H, the court may make an order – (a) Prohibiting any person from disposing of, or dealing with, the property or such part thereof or interest except in the manner specified in the order;

(b) Tainted property is defined in Section 3 of the PCA: "Tainted Property in relation to a serious offence or a foreign serious offence means: (a) property used in or in connection with the commission of the offence; (b) property intended to be used in, or in connection with, the commission of the offence; or (c) proceeds of crime.

Legal Argument 1:

MACMA only Permits Restraints and Forfeitures, and not Seizures, and thus the Courts here should Not Have Permitted the U.S. Seizure of the AMADEA.

Related Petition Grounds

Ground 1

The Court of Appeal erred in law in upholding the decision of the High Court delivered on 3 May 2022 that registered a United States of America 'warrant to seize property (Amadea) subject to forfeiture issued by the United States District Court of Columbia in Case No. 22-sZ-9 when (1) Section 31(2) of the Mutual Assistance in Criminal Matters Act 1997 only permits an application to restrain persons from dealing with property to be

made, not seizure in rem, and (2) Section 31(6) of MACMA only permits Fijian courts to enforce foreign restraining orders "as if it were a restraining order made by the Court under the Proceeds of Crime Act 1997 at the time of registration."

Ground 2

The Court of Appeal erred in law in upholding that the 'Warrant to Seize Property Subject to Forfeiture' issued by the United States District Court for the District Court of Columbia in Case No. 22-sZ-9 was a Foreign Restraining Order when the order was for the seizure of the Motor Yacht Amadea with International Maritime Organization Number 1012531. Restraint and seizure are vitally different.

Ground 3

The Court of Appeal erred in endorsing the reasoning of the High Court that if the seizure warrant was not a foreign restraining order within the meaning of MACMA then "the court can exercise its discretion so as to refuse the request for registration". If (as the Petitioner submits) the seizure warrant was not a foreign restraining order within the meaning of the statute, the court has no discretion as it has no jurisdiction to register the warrant.

64. In the present case, the DPP requested in its Amended Originating Summons an order to register the Seizure Warrant pursuant to MACMA Sections 31(2), 31(3), and 31(6). These provisions, however, only apply to foreign restraining orders, and not foreign seizure orders. Thus, there is a fundamental mismatch between the assistance requested by the U.S. authorities and the assistance which could have been given by the Fijian Courts. The U.S. authorities came with a seizure warrant. But on the facts here, this action could not have been obtained under the legislation – MACMA - in place.

65. As noted above, the MACMA only speaks to a foreign restraining order, which it defines as an order to restrain someone from dealing with certain property.

66. Other jurisdictions have essentially similar concepts in differing situations: in civil matters, freezing injunctions in England and Wales, Rule B attachments in the United States. The touchstone is that they prohibit, on pain of contempt or other sanction, a person or person from dealing with property. But they do not permit the government to take physical possession of the property without due process.

67. Equally common, and equally clear in concept, is the notion of seizure:

> *"The ordinary meaning of the word "seizure" is the act of "taking forcible possession either by a lawful authority or by overpowering force…"* (KAC v KIC [1999] 1 Lloyds Rep 803 at 812) [**Tab 7**].

68. A restraining order and a seizure order or warrant are therefore very different things, with different legal and practical consequences. A restraining order only restrains the property by prohibiting dealing with the property. Seizure is a far greater encumbrance, as it actually permits another to take forcible possession of the property and permanently deprives the owner of the property.

69. Despite what the U.S. stated in its request, the Seizure Warrant at issue here on its face is not a foreign restraining order. Rather, it commands a law enforcement officer to seize the AMADEA. It is an order for seizure – the forcible transfer of possession, and it says nothing about restraining any person from dealing with the AMADEA.

70. As such, the Seizure Warrant cannot be registered under MACMA Section 31(2), which only permits the registration of a foreign restraining order.[4] It is a different order, conceptually and practically.

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[4] Nor, incidentally, could the Seizure Order be registered as a foreign forfeiture order or foreign pecuniary penalty order under 31(1), not least because there has been no conviction as required by that sub-section. And in any event no application was made by the DPP under that sub-section. Neither has there been an application for a domestic restraining order under Section 33 of MACMA. The US authorities and the First Respondent only made their application for registration of the Seizure Warrant under

71. This is the conclusion correctly reached by the Court of Appeal of Victoria, Australia on similarly worded legislation in *DPP v Peniche* [2000] VCSA 40 [**Tab 8**]:

> *"On 30 July 1999, Mandie, J. dismissed an application by the Commonwealth Director of Public Prosecutions for registration of an order made on 11 November 1998 by a federal prosecutor of the United Mexican States in respect of the property of Carlos Cabal Peniche (also known as Rafael Certi Merrit) located in Australia. The application was made under s.34(4) of the Mutual Assistance in Criminal Matters Act 1987 of the Commonwealth on the basis that the order was a "foreign restraining order" within the meaning of s.3 of that Act. It was resisted simply on the ground that the order did not fall within the definition in s.3. Mandie, J. thought that it did not, and dismissed the application. His Honour considered that the order was one for the seizure of property, not one "restraining a particular person, or all persons, from dealing with property", as required by the definition.*
>
> *We think his Honour was right in reaching that conclusion, a conclusion which, if correct, was of course fatal to the application."*

72. *Bujak v SG* [2009] NZSC 42 [**Tab 9**] – a New Zealand Supreme Court decision - held that a Polish Order was in substance a restraining order and thus could be registered under that legislation. However, that was plainly a multifaceted order of the Polish Court, and crucially one which was directed to an individual amounting to "a compulsory charge" over the property in question. This is quite unlike the Seizure Warrant here, which is an order in rem, in relation to proposed proceedings in rem, and which directs the forcible taking of possession by a law enforcement officer.

73. *As an initial matter, in Bujak, the court explained the difference between a foreign forfeiture order and a foreign restraining order which "does not,*

Section 31(2). That approach is fatally flawed. The Fiji Courts were bound by these requests and were not permitted to go beyond them.

upon registration in this country, deprive the owner of property of that ownership. It does no more than restrain the owner from dealing with the property." For this reason, "[t]he evidence required to justify restraint will usually be less compelling than that required to justify the more extreme step of confiscation of property." Paragraph 12.

74. First, *Bujak* holds that unless the order which is sought to be registered is within the MACMA definition, it cannot be registered: **"What kinds of foreign restraining orders may be registered have been specified by Parliament. The view reached by Parliament is set out in the statutory definition, which must be met.":** paragraph [14] sub [46]. This must be correct.

75. Second, the Court in New Zealand found that when faced with a foreign order which was in effect partly a restraining order and partly something else (e.g., an order for security) it can be registered and take effect only to the extent that it is a restraining order. If the foreign order contains anything beyond a restraining order, it should be ignored to the extent that it contains something else (an order for security or seizure).

76. With respect, this is not an approach to be followed in Fiji. The reasoning in *DPP v Peniche* is preferable. The "pick and mix" approach suggested in *Bujak*:

(a) is not consistent with the statutory language of MACMA. That expressly stipulates that in order to be registrable, a foreign order must be a foreign restraining order as defined. An order which, on careful analysis, has some elements conforming to the statutory definition mixed in with others which do not conform is not a foreign restraining order.

(b) is gravely impractical, particularly to say that such an order can registered, but then in part ignored as ineffective or unenforceable. How could either an officer of the Court or a third party with sight of the order be sure what parts of the registered order were effective (within the statutory definition) and which were not (outside the definition)?

77. In any event, the Petitioner submits that on the facts here that particular impracticality does not arise, because it is obvious that **NO PART** of the Seizure Warrant can even arguably fall within the definition of a foreign restraining order.

(a) The Petitioner urges the Court to read the Seizure Warrant in full. The Seizure Warrant embodies a simple concept. It commands an authorized law officer to seize – physically take possession of – the Amadea which the order on its face says is located in the District of Columbia, United States. Nothing else.

(b) As the DPP has admitted at paragraph 3.20 of its submissions at Surpeme Court Record at page 118 the Seizure Warrant is an action in rem. It does not direct anyone (apart from the authorized officer) to do anything or refrain from doing anything.

(c) This makes it impossible to argue (as the DPP is forced to argue) that the Seizure Warrant is *"an order…restraining a person, or persons, from dealing with property"*. The Seizure Warrant does not do that. It commands an authorized officer under United States law to take forcible possession of the AMADEA, i.e., to confiscate the property and remove possession of it from Petitioner. And it sought to do so without any showing of compelling evidence that the court, even in *Bujak* [Supra], noted was required prior to depriving someone of their property—not merely restraining them from dealing with it.

(d) This is not a case like *Bujak*:

(i) First, *Bujak* was an order directed at a specific person (Mr. Bujak) and no doubt affecting others holding intangible assets to his account (bank funds etc.). By contrast, the Seizure Warrant is an order in rem, expressly stated to require taking possession of the Amadea. The DPP says this means ownership is irrelevant: paras 3.20, 3.24 Supreme Court Record at page 118. But ownership must be relevant for an in rem action (if the owner of the vessel is

not sanctioned—which he is not—then the order should not have issued). More to the point, however it is not irrelevant for a restraining order, which has to *"restrain a person, or persons, from dealing with property"* under Section 31(2) of MACMA.

(ii) Second, the order in *Bujak* was held to be (or to contain) freezing orders. The Polish court orders, though in part expressed as "seizures," did not order the taking of possession, and were instead expressly "freezing" orders. See the detail of the orders made and explained in *Bujak*: these were orders for seizure of choses in action (bank accounts etc, para 29), not real property. It was held by the NZ court that "*among the effects of the order was to freeze the property and prevent others from dealing with it until further order of the court*" (para 41, and 42). By contrast, the effect of the Seizure Warrant in this case is, clearly and on its face, not to freeze the AMADEA but simply to take possession of it—indeed to sail it to the United States. The DPP obtained what amounted to a forfeiture order—which not merely restrained Petitioners from dealing with the vessel, but took possession of it away from them—under the guise of a restraining order.

(iii) Nor is there room for nuance of expression in translation in this case. Both Fiji and the U.S. have a common law understanding of "seizure". The Seizure Warrant could not be clearer that it was not merely seeking to restrain Petitioner from dealing with his property, but to actually take it away from him as if it were a forfeiture order, but to do so without providing any due process.

78. Accordingly, even if the "pick and mix" approach suggested by *Bujak* [*Supra*] were permissible (which it is submitted it is not), the Seizure Warrant at issue in this case is not registrable. There is nothing about restraining in the US Seizure Warrant. There is a fatal – and complete - mismatch between the Seizure Warrant and the definition of what can be

registered under MACMA. We again say **NO PART** of the Seizure Warrant is a restraining order. As was stated in *Bujak* by the Supreme Court at paragraph 23:

> *"The substance of the order, rather than specific words which may appear within it, should determine whether or not it constitutes a foreign restraining order. Looking at the Polish Order as a whole, it is directed to the restraint rather than the seizure of the appellant's property. The unchallenged evidence of the prosecutor confirms that conclusion."*

79. No language in the Seizure Warrant is aimed at restraint. It is all about seizure, complete confiscation of the property from Petitioner, without any evidence presented that it was entitled to forfeit the property. And this is confirmed by the unchallenged evidence of the actions of the U.S. Authorities. The U.S. Authorities took physical possession of the AMADEA and sailed it to the U.S., where it has remained ever since, without the U.S. even bothering to apply for a forfeiture order.

80. Nor is this cured by DPP's assertion that *"seizure is a way to restrain persons from dealing with the property. If the yacht is not seized then, as a highly mobile asset, it can move away of the reach of the jurisdiction of Courts"* (para 3.4 Supreme Court Record at page 115). Of course, yachts are highly mobile. They can be prevented from moving by arrest or by a foreign restraining order that "may be enforced, as if it were a restraining order made by the Court under the Proceeds of Crime Act 1997 at the time of registration." Section 31(6) of MACMA. But that is not what happened here. The United States was not seeking to restrain the vessel, but to physically take possession of it away from Petitioner.

81. Under MACMA, there is no power given to any foreign country to issue a warrant to seize a property and to have it transferred to its own country. The only power given under MACMA is an order of a foreign country ***'restraining a person, or persons, from dealing with property'***. There is simply no restraining order sought under the Seizure Warrant. It is not a foreign restraining order. **There is a fatal mismatch between the order**

made by the foreign court and the assistance which the Court can give under MACMA.

82. As a result of the defective warrant (defective in the sense of inconsistent with the nature of MACMA) issued by the United States District Court for the District of Columbia to seize the AMADEA, and as a result of defective application by the DPP seeking to register a warrant to seize the AMADEA (again, inconsistent with MACMA), the High Court and the Court of Appeal erred in its final order in registering the Seizure Warrant.

83. There is no power given to the Court under Sections 31(2) and Sections 31(3) of the MACMA to register the in rem **"warrant to seize the property (Amadea) subject to forfeiture issued by the United States District Court for the District of Columbia in Case No. 22 -sZ-9."** (We accept that even though the order was made under Section 33(3), the Judge below meant Section 31(3)).

84. There is a reason why MACMA only provides power to register a restraining order as opposed to a seizure order. Seizure by a foreign state from the jurisdiction of Fiji is a much more dramatic action than a restraint here in Fiji, particularly without a forfeiture order from the foreign state. By only permitting the registration of a foreign restraining order, the Courts in Fiji can avoid the need for a full hearing on whether a seizure without a forfeiture order is appropriate.

85. In fact, the U.S. Authorities gave the DPP and the Fiji Courts the misimpression that they would be seeking forfeiture of the AMADEA imminently, claiming that the seizure was a "preliminary step" to forfeiture. A year has passed and the U.S. Authorities have not even filed a forfeiture action against the AMADEA in a U.S. court. In addition, seizure is not a required preliminary step to forfeiture, and the U.S. Authorities could have obtained a forfeiture order in the U.S. and (if they made the sufficient factual and legal showing and they obtained a forfeiture order after providing the Mr. Khudaynatov due process) sought Fiji's assistance to enforce that order against the AMADEA.

86. It is precisely because of this "Final Order" of the Court that the DPP and the U.S. Authorities came to the erroneous conclusion that the U.S. Authorities could physically seize the AMADEA and sail the vessel to the U.S. That is indeed a seizure: forcible dispossession. It is not giving effect to a restraining order. This mismatch between the Seizure Warrant of the US Court and the order for registration of the Seizure Warrant as a foreign restraining order has led to error, confusion, and overreach. It was fatal to the application brought by the Respondent DPP.

Legal Argument 2:

MACMA gives the Court discretion as to whether it should register a foreign order, and that exercise of discretion should include reviewing the underlying basis of the foreign order, not merely rubber stamping it.

Related Petition Grounds

Grounds 4

The Court of Appeal erred in law in upholding that Section 31(6) of the Mutual Assistance in Criminal Matters Act was irrelevant to applications to register a foreign restraining order when Section 31(6) expressly referenced and required the Court to consider the parallel provisions in the Proceeds of Crimes Act 1997 determining an application for a registration order against property.

Ground 5

The Court of Appeal erred in law in upholding that the Court is not required to consider the factors in the Proceeds of Crimes Act 1997, particularly Part 2, Division 2A, Civil Forfeiture Orders at Section 19(B) had to be considered before registering a foreign restraining order.

Ground 6

The Court of Appeal erred in law in declining to consider these underlying facts on the grounds that to do so would amount to reviewing the US Court order. The Courts of Fiji are neither compelled nor permitted simply to

rubber stamp the orders of any foreign state, but can and must apply the domestic law, which involves establishing power jurisdiction to make an order, and exercising proper discretion in doing so.

Ground 7

The Court of Appeal erred in law in relying upon the fact that some 20 years after enacting MACMA, Fiji acceded to UNTOC, as somehow abrogating the requirements of the domestic legislation. The obligation on the courts of Fiji to apply its domestic law does not in any way render the assistance available to foreign states "a dead letter". Fiji is not obliged by UNCTOC to ignore its domestic law in giving assistance to foreign states.

87. The Petitioner submits that the High Court and the Court of Appeal erred by limiting the Court's discretion in these matters to the point that it effectively served (and would continue to serve) as a "rubber stamp" to the seizure warrants of foreign states. Following the ruling of the High Court and the Court of Appeal, courts in Fiji would simply need to look at the four corners of the warrant or order to see whether the foreign state submitted (i) a foreign restraining order, (ii) in respect of a serious offence, and (iii) against property located in Fiji, without analyzing the underlying basis. The courts would effectively be merely checking boxes.

88. However, the MACMA—and public policy—demand greater judgment discretion than that. Discretion is built into the MACMA in two ways. First, Section 31(3) states that the Court "may" register a foreign restraining order. Second, Section 31(6) requires that a foreign restraining order be enforced as if it were a domestic order under the Proceeds of Crimes Act 1997 ("**PCA**"). Indeed, the DPP invoked Sections 31(3) and 31(6) of the MACMA in their Originating Summons in this matter. The Courts here erred by failing to analyze the underlying basis for the Seizure Warrant consistent with these provisions.

For Amended Originating Summons see Appeal Record Volume 4-4 at page 1549.

89. Indeed, it is clear that the U.S. Authorities believed that the DPP needed to review the underlying basis of the Seizure Warrant before agreeing to provide assistance by making an application in the High Court for registration of the warrant. In the U.S. Request, the U.S. Authorities set forth some of its "evidence" purporting to support its request for the Seizure Warrant.

90. It is equally clear that even the DPP believed that the High Court would analyze the underlying basis for the Seizure Warrant when it filed with the Court not only the U.S. Request, but also the more detailed Bergen Affidavit as part of its initial submission. If the DPP had believed that the High Court only needed to see that the request was for a foreign restraining order related to a serious offence for an asset located in Fiji, it would not have submitted the Bergen Affidavit to the High Court.

91. Regardless, the Learned Judge at paragraphs 25 to 28 of the High Court said as follows:

> [25] Respondent's contention that enforceability attached to an order after registration of the same contained in Section 31(6) of MACMA, required the court to consider this application in terms of Section 19B(1) of Proceeds of Crime Act 1997 is without merit.
>
> [26] The enforceability after an order made under Section 31 (3) of MACMA is not a ground to consider this application for registration of a foreign restraining order as an exercise of original jurisdiction in terms of Section 19B(1) of Proceeds of Crime Act 1995.
>
> [27] By the same token, it is not mandatory for the court to register a foreign order and scope of that is to consider the factors stated in Section 31(2) of MACMA.
>
> [28] The requirements in terms of Section 31(2) of MACMA need to consider in the exercise of power granted in terms of Section 31(3) of MACMA. These factors are

defined in exclusive manner in Section 3 of MACMA that provides protection to rights. This is a limited scope.

High Court Judgment: Appeal Record Volume 1-4 at pages 13 to 20

92. Moreover, the High Court determined that the Seizure Warrant related to a serious offence simply because the U.S. Request conclusory stated that the AMADEA was "property involved in money laundering," and money laundering is also considered a serious offence in Fiji. The Court did not analyze whether the evidence put forth before it by the U.S. and the DPP actually supported the money laundering allegation or the allegation of sanctions evasion to bring it within the definition of 'tainted property' in the Proceeds of Crimes Act.[5] **[High Court Judgement paragraph 6.]**

93. The Petitioner submits that the High Court limited the discretion to such an extent that it gives courts essentially no discretion at all. Petitioner asserts that there must be some 'filtration process' in considering whether or not to register a foreign restraining order. Otherwise, a Court in Fiji would have to register a foreign registration order no matter the circumstances under which the request was made.

94. Indeed, even putting aside MACMA for the moment, this is what is contemplated in the UNTOC. Article 13 provides that "the decisions or actions of this article shall be taken by the requested State Party in accordance with its domestic law." In addition, Article 18 provides that assistance "may be refused". . . (c) if the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested . . ."

95. Thus, Petitioner asserts that the Courts below erred in not considering the relevant provisions of the PCA in making an order for registration. By applying the PCA, the Court ensures that foreign authorities applying for assistance by way of restraining order are in the same position (and not a

[5] Had the High Court even done a cursory analysis, it would have seen that the purported evidence does not support allegations of money laundering or sanctions evasion. The main criminality alleged in the U.S. Request and the Bergen Affidavit is sanctions evasion, by way of payments made in U.S. dollars or that traversed the U.S. banking system on behalf of the AMADEA. Not only of the invoices or payments listed in the U.S. Request or the Bergen Affidavit is linked to Mr. Kerimov. In addition, most of the "payments" delineated by the U.S. authorities are not evidence payments, or even attempts to pay, at all. Rather, they are invoices—made payable to Millemarin—with no evidence that they were paid at all. Without a payment or an attempt to pay, there can be no sanctions violation, and thus no crime, let alone any serious offence.

better or more powerful position) as Fiji's own authorities applying for a restraining order.

96. The Petitioner asked the Judge below at the hearing of this matter whether if on a request by Russia under MACMA to the Central Authority in Fiji to place a restraining order on the huge Coast Guard Boat belonging to the U.S. that was in Fiji at the time of hearing Fiji, would the Court grant a restraining order.

97. Or alternatively and closer to home, if a tiny country like Tuvalu requested Fiji to register a restraining order against one of Fiji's Navy boats, would the Court act on such an order? What is the difference between an American Court Order, a Russian Court Order, and/or a Tuvaluan Court Order?

98. The Petitioner submits that the Judge in the High Court was bound by the decision of Director *of Public Prosecutions of the Republic of Fiji v Chase [2017] FJHC 156; HBM114.2015 (28 February 2017)* **[Tab 10]** and further, he did not provide adequate reasons for not following the case of *Director of Public Prosecutions of the Republic of Fiji v Chase [2017] FJHC 156; HBM114.2015 (28 February 2017)* a decision also of the High Court of Fiji. In fact, the High Court and the Court of Appeal did not refer at all to the *Chase* judgment in its judgment.

99. The High Court in *Chase* [Supra] considered the PCA, specifically Section 35 (i) – Restraining Orders, when considering whether or not to register a foreign restraining order, as there was a conviction. In the present appeal, Part 2, Division 2A, is headed *"Civil Forfeiture Orders"*. The U.S. Authorities in their request to the Central Authority in Fiji said: *"The US authorities also* ***intend to bring*** *a non-conviction based civil in rem forfeiture action relation to the Amadea."* Thus, the correct provision for the High Court to have considered was Section 19(B). Section 19(B) of the PCA is identical to Section 35(1) of the PCA and both sections obligate a Court on an application for a restraining order "to be satisfied that there are reasonable grounds for suspecting that property is tainted property or terrorist property."

100. This is precisely what the High Court did in *Chase:* considered whether the property to be restrained was tainted property.

101. In this case, the High Court and Court of Appeal gave no such consideration, and did not even refer to *Chase*, let alone set forth any reasons to depart from *Chase* as a court of parallel jurisdiction.

102. The general purpose and intent of MACMA is to lend to foreign states some of the powers of Fiji's legal authorities by way of assistance to the foreign state in relation to actions in Fiji. There is no reason to suppose that MACMA intended to put such foreign states in a *more powerful* position than Fiji's own authorities, and every reason to suppose that it did not have such intent. It would be strange indeed if Fiji were to exercise powers at the request a foreign state which it could not exercise for its own benefit. If a restraining order would not be granted under domestic legislation, it cannot be granted by registration under MACMA.

103. This is why the Petitioner submits that the Judge below erred in not considering the relevant provisions of the Proceeds of Crimes Act. The relevant section of the PCA that the Judge below should have applied to decide whether to register a foreign restraining order was Part 2, Division 2A, Civil Forfeiture Orders at Section 19(B), which provides that the court must be "satisfied that there are reasonable grounds for suspecting that the property is tainted property."

104. The High Court and the Court of Appeal gave no consideration to Section 19B(1) of the PCA where it had the duty to be satisfied that the Amadea was tainted property before ordering a restraint under Section 19B(1). The High Court and the Court of Appeal insisted that the section was irrelevant and that Fiji laws did not require the court to undertake any analysis to determine if there are reasonable grounds for suspecting that the property is tainted property.

105. The High Court's and the Court of Appeal's ruling on this issue were in direct conflict Section 31 (6) together with Part 2, Division 2A, Civil Forfeiture Orders at Section 19(B) which requires the court to satisfy itself such grounds exist.

Legal Argument 3:

Had the Court reviewed the underlying basis for the Seizure Warrant, it would have found the factual basis woefully inadequate, and denied the U.S.'s Request.

Related *Petition Grounds*

Ground 8

The Court of Appeal erred in law in failing to consider Section 19(B) of the Proceeds of Crime Act which required the Court to be satisfied that there were reasonable grounds for suspecting that the Motor Yacht Amadea with International Maritime Organization Number 1012531 is tainted property before registering the foreign restraining order.

Ground 9

The Court of Appeal erred in law in upholding the registration of the foreign restraining order when there was no evidence that Motor Yacht Amadea with International Maritime Organization Number 1012531 is property used in, or in connection with, the commission of the offence and/or property intended to be used in, or in connection with, the commission of the offence and/or proceeds of crime.

Ground 10

The Court of Appeal erred in law and in fact in failing to find that the beneficial owner of the Motor Yacht Amadea with International Maritime Organization Number 1012531 given there is undisputed evidence before the Court was that the beneficial owner of the Motor Yacht Amadea was Mr. Eduard Khudaynatov.

106. The DPP and the U.S. authorities did not come close to discharging the burden upon them to satisfy the Court that there are reasonable grounds for suspecting that the AMADEA is tainted property under the PCA.

107. Tainted property in relation to a serious offence or a foreign serious offence means:

(a) property used in or in connection with the commission of the offence;

(b) property intended to be used in, or in connection with, the commission of the offence; or

(c) proceeds of crime.

108. The case presented rested upon a single proposition that the AMADEA is not (as the Owners say and have evidenced) beneficially owned by Mr. Khudaynatov (who U.S. authorities admit is not sanctioned), but instead by Mr. Kerimov (who is sanctioned).

109. The foundations of this proposition are weak and fanciful. They amount to no more than:

(a) Unattributed rumours within "the yacht brokerage community";

(b) A mere assertion that Mr. Khudaynatov is not the beneficial owner, but rather (in the pejorative but explained and unsubstantiated words of the Bergen Affidavit) "a straw beneficial owner";

(c) Accurate reports that Mr. Khudaynatov is also the beneficial owner of another substantial yacht;

(d) Alleged interviews with unnamed crewmembers who would not have first-hand knowledge of ownership, some of whom even expressed their belief that Mr. Khudaynatov was the owner and none of whom stated they knew Mr. Kerimov to be the owner;

(e) Facts that do not evidence ownership by Mr. Kerimov, including those members of his family have been on board the AMADEA.

110. Significantly, the DPP presented no live testimony and opportunity for a hearing during which Petitioner could challenge the evidence against him. This is in complete contrast, even to *Bujak*, where "[t]he Polish prosecutor provided extensive sworn evidence in support of the registration of the Polish Order." The Court in Bujak found that "[v]ery significantly, no part of this evidence was challenged by the appellant or any witness on his behalf." *Bujak*, paragraph 17. Here, no such live evidentiary hearing was held. And the evidence demonstrates the Bergen Affidavit was materially misleading.

111. To start, the Bergen Affidavit relies on unnamed (i) "crew members" and (ii) unnamed "members of the yacht brokerage community," who allegedly that in 2021, the AMADEA was the subject of a sale, and they "believed" that Mr. Kerimov was the buyer. **(Bergen Affidavit at paragraphs 25, 26(a) and (b), 34(a), 35(j) See Appeal Record Volume 4-4 at pages 1453, 1454, 1456 - 1460).**

- **But Allegations of unverified statements by unnamed persons are devoid of evidentiary value under U.S law. In any event, no crew member ever stated they believed Mr. Kerimov to be the owner. Moreover,** save for the Captain, who provided to Fiji law enforcement the ownership documents identifying Mr. Khudaynatov as the ultimate beneficial owner of the AMADEA, no crew members or brokers from other companies would have firsthand knowledge of who was the ultimate beneficial owner of the vessel or whether any sale occurred.

112. Mr. Kerimov toured the yacht in late 2020/early 2021. **(Bergen Affidavit at paragraph 26(b))**

- This, however, is not proof of ownership. Indeed, it is proof that he did not own the vessel at that time.

113. Per Cayman Islands records, the AMADEA was sold in or about August 2021. **(Bergen Affidavit at paragraph27)**

- As demonstrated herein, in August 2021 there was a change in the holding company that owned the AMADEA, but the ultimate beneficial owner remained Mr. Khudaynatov.

114. In October 2021, the AMADEA's broker "abruptly" said it was no longer available for viewings. **(Bergen Affidavit at paragraph28)**

- However, while a brokerage representative may have said that the AMADEA was no longer available for viewing, this simply proves that Mr. Khudaynatov decided to take it off the market in favor of trying to charter it.

115. The Bergin Affidavit alleges that: Mr. Khudaynatov is a straw owner for Mr. Kerimov because:

- Mr. Khudaynatov cannot afford to own the AMADEA and other yachts. **(Bergen Affidavit at paragraphs 31-33)**

- Mr. Khudaynatov, however, is in fact a billionaire, a fact that has been acknowledged by the European Union, and he commissioned the yachts he purchased with his own funds.

116. Mr. Kerimov's family took and planned trips on the AMADEA. **(Bergen Affidavit at paragraphs 34(b), 35(a)-(f), 35(i), 35(k)).**

- Mr. Kermiov was never on the vessel as a charter guest, only to view it. That his family chartered the vessel is not proof of ownership.

117. Mr. Kerimov's family demanded changes to the AMADEA. **(Bergen Affidavit at paragraphs 35(g)-(h))**.

- Requests for minor changes such as those here (i.e., purchasing a pizza (toaster) oven and moving an electrical outlet) are not unusual for long-term charters, and are not proof of ownership.

118. Because Mr. Kerimov is the AMADEA's true owner and Millemarin (Mr. Khudaynatov) is only a straw owner, invoices to Millemarin and payments made on the AMADEA's behalf in U.S. dollars violate sanctions law.

- No invoice suggests the true owner is Mr. Kerimov and the invoices merely state that Millemarin is the owner, without reference to the UBO. If Mr. Khudaynatov is the owner of Millemarin (and therefore the Amadea) which he is, payments made on the Amadea's behalf in U.S. dollars do not violate sanctions law.

119. With respect to crew members, SA Bergen failed to explain how the crew members would have firsthand knowledge of who owned the AMADEA, and why unverified statements of unknown persons should be credited. In the U.S. Request, the U.S. provided more detail about what five different crew members stated, identifying them as Crew-1 through Crew-5. **[U.S. Request pp. 7-8]**. Supposedly, Crew-1 "understood" Mr. Kerimov to be the owner of the AMADEA, and "Crew-2" supposedly said that Mr. Kerimov had owned the AMADEA since the Fall 2021 via a "backdoor Russian deal." **[p. 7]** Crew-3 told investigators that they believed Mr. Khudaynatov to be the owner of the AMADEA, while Crew-4 and Crew-5 did not appear to identify anyone as the owner of the AMADEA. **[p. 8]** To the extent these five crew members are the same individuals who were interviewed in Fiji on the night of 12 April 2022, Petitioner knows, based on interviews by Petitioner's U.S. counsel, that not one of them identified Mr. Kerimov as the owner of the AMADEA, and that most of them were not in a position to have firsthand knowledge of who the ultimate beneficial owner was. There is no admissible evidence these statements were ever made. Moreover, these statements should not be, and should not have been, credited for purposes of establishing probable cause.

120. Second, according to the affidavit, these crew members stated that members of Mr. Kerimov's family, including his adult daughter and her children, had been on board the AMADEA for trips, and that code names were used for them when they were on board. [Bergen Affidavit paragraphs 34(a)-(d), 35(b)-(d)]. Gulnara Kerimova—Mr. Kerimov's adult daughter—and her family members chartered the AMADEA, and the use of code

names for charter guests is typical in the industry to protect privacy. Neither of these facts is proof of ownership.

121. Third, Bergen cited to emails indicating that Gulnara scheduled a Caribbean trip for early 2022 and discussed a travel agenda for later in 2022 and 2023, and requested certain modifications to the yacht itself. **[Bergen Affidavit at paragraphs 35(e)-(h)]**. Again, these facts are consistent with the long-term charter plans that Gulnara Kerimova was making for the AMADEA, and are not proof of ownership by her father, who never appeared as a guest during her charters of the vessel.

122. In the subsection of the Bergen Affidavit entitled "Unlicensed U.S. Dollar Payments for the AMADEA," Bergen provided no evidence that any of the invoices or payments referred to therein are linked to Mr. Kerimov. Moreover, Bergen listed a selection of invoices made payable to Petitioner Millemarin that "Fijian authorities found" on the AMADEA, but did not provide evidence that any of these invoices were actually paid or even attempted to be paid. **[Bergen Affidavit at paragraphs 38-40]**. If there was no payment or an attempt to pay, there could be no sanctions violation. Bergen then described payments that were actually paid on behalf of the AMADEA in U.S. dollars, but failed to provide any evidence linking these payments to Mr. Kerimov. **[Bergen Affidavit at paragraphs 41-42].** Because each of these payments were made by Millemarin which was and is owned by a non-sanctioned individual, no sanctions violation occurred.

123. Finally, the U.S. told the Republic of Fiji that there was a need for exigency in the U.S. Request. This claim, however, was based on an unfounded assumption that the AMADEA was trying to escape detection and make a run for Russia. SA Bergen claimed that open-source reporting showed that the AMADEA turned off its AIS system on 24 February 2022, the day the war started, and did so intermittently thereafter. **[Bergen Affidavit at paragraph 36]**. This claim is entirely misleading. Open-source reporting actually shows that the AMADEA's location was publicly trackable every fifteen minutes between 24 February 2022 and 12 April 2022. Moreover, even had the AIS been turned off, that would not be evidence of ownership by Mr. Kerimov.

124. In addition, the U.S. asserted that while paperwork showed that the AMADEA's next destination was the Philippines (which it was), there was "reason to believe" that it was actually heading to Russia. **[U.S. Request pp. 2-3]**. But the affidavit provided no evidence supporting this assertion. The U.S. then asserted that many designated "oligarchs" made efforts to move their yachts to Russia or other safer jurisdictions, and that the route taken by the AMADEA suggested that the AMADEA "may" have been doing the same. **[U.S. Request p. 3.]** However, that route is also consistent with the AMADEA going to the Philippines, where documents demonstrate it was planning to go for five weeks of required maintenance and servicing. Simply put, there was no credible evidence that the vessel was heading to Russia, and thus no exigency.

125. The evidential basis for even these weak propositions was disturbingly inadequate. The order sought was, as registration of a restraining order, one of the utmost seriousness. It involves allegations of criminal activity. The consequences of acceding to the U.S.'s request were grave if the yacht were to be detained in Fiji. The consequences would be graver still if the yacht were to be seized and sailed to the United States, as the U.S. authorities did. This was the only opportunity the Courts of Fiji had to consider the evidence in this matter, on which Fiji's assistance was requested.

126. Yet for all this gravity, the evidence put forward is no more than anonymous, unreliable, and inaccurate hearsay in an affidavit—not even in live testimony. Reliance upon such evidence is to be deprecated under any circumstances, as it goes against the basic common law position that a party is entitled to see the evidence against them. A party cannot properly assess, address, and rebut evidence where its circumstances, context, and provenance are withheld from them. So, for example, in the absence of proper details the Court is incapable of determining whether a crew member ever made any comment suggesting Mr. Kerimov was the owner—indeed, no crew member interviewed by the authorities made such statement.

127. At most, the Bergen Affidavit should have been afforded only the most insubstantial weight.

128. That insubstantial weight cannot displace the clear and undisputed evidence adduced by the Petitioner, which is painstakingly detailed above, that Mr. Khudaynatov is the beneficial owner of the Amadea.

129. There is absolutely no evidence contradicting this structure, only the US authorities' mere assertion or supposition that somehow, Mr. Kerimov is the secret owner notwithstanding all the documentary evidence—including Mr. Khudaynatov's statements—that he is the ultimate beneficial owner of Millemarin, which owns the AMADEA.

For Ownership Evidence See Appeal Record Volume 4-4 at page 1039 to 1110

130. These transactions conclusively demonstrating Mr. Khudaynatov's ownership are acknowledged in the U.S. Request. See Shankar Affidavit at Annexure AA 1 at page 6 and 7.

> *"Business records of the Caymans Islands Shipping registry show that the AMADEA was initially registered in the Cayman Islands in 2017, but that on August 16, 2021, a new certificate of British registry was issued on transfer of ownership in the name of Millemarin Investment Ltd. On September 5, 2021, a fee for "Registration of Transfer or Transmission" was paid for by a Cayman Islands-based law firm.*
>
> *Additionally in July 2021, a yacht broker corresponded with a representative of Company A about viewing the AMADEA on behalf of a potential purchaser. The Company A representative indicated that the vessel was available for viewing. However, on October 12 2021, the Company A representative abruptly stated that the vessel was no longer available for viewings. This further corroborates that the vessel was sold (and thus went off the market) sometime between July and October 2021.*

As detailed in the original request, in mid-March 2022, authorities from another country conducted a search of the AMADEA. The captain of the vessel provided an email from Company A with attachments detailing the purported beneficial ownership of the AMADEA. The documents purport to show that the ultimate beneficial ownership of the AMADEA. The documents purport to show that the ultimate beneficial ownership is a Russian national ("Individual-1"), by way of Millemarin Investment Ltd. (a BVI company), International Finance LTD (a BVI company), and the Boltenko Trust (a Swiss structure). Individual-1 is not a subject of U.S sanctions but is the former president of the Russian state-controlled oil company Rosneft.

See US Authorities Evidence at Appeal Record Volume 4-4 at pages 1559 – 1560.

131. Even the U.S. Authorities acknowledged that Millemarin Investments Ltd., the Petitioner here, is the registered owner of the AMADEA and the beneficial owner is ("Individual 1") "is not subject to U.S sanctions." Individual 1 must be Mr. Khudaynatov, identified in SA Bergen's Affidavit. The anonymising of names by the Respondent is wholly unacceptable, meaning little weight may be placed on their evidence. Mr. Khudaynatov can be identified; but others "in the yacht brokerage community" or "crew members" cannot. [U.S Request at Volume 4-4 of Appeal Record at page 1559

132. To displace the clear documentary evidence of the beneficial ownership of the AMADEA, the U.S. Request relies on hearsay evidence of unidentified individuals to assert that Mr. Kerimov is the beneficial owner of the AMADEA.

133. For instance, at Annexure AA 1 at page 6 and 7 of the U.S. Request at pages 1559 -1560 of Appeal Record , a witness described as W1 and who appears to be a rival yacht broker stated that he and his company were cut

out of the final sale by Company A [the AMADEA's broker]. There is however no evidence of any sale to any third party, **[U.S. Request at page 1556 of Appeal Record]**

134. W2 is an unnamed employee of 'another' yacht brokerage. W2 reported that he has had personal contact with Mr. Kerimov, and knew that Mr. Kerimov had inspected the AMADEA in 2021. That Mr. Kerimov "inspected" the AMADEA in 2021 is proof that he did not own it prior to the "inspection," and certainly not proof that he owns it now **[U.S. Request at page 1556 of Appeal Record]**

135. W3 is apparently an associate of Mr. Kerimov who stated that Mr. Kerimov used the AMADEA; however, W3 was unsure if "Mr. Kerimov owned the yacht or merely regularly rented it." No crew members are alleged to have seen Mr. Kerimov on the yacht, ever. In fact, Mr. Kerimov was never on the vessel as a guest, but merely to tour it. **[U.S. Request at page 1556 of Appeal Record]**

136. This evidence is so poor it should be entirely ignored. It should be inadmissible; if admitted, its weight must be negligible.

137. Likewise, the purported statements of crew members who were interviewed by FBI Agents and Fiji law enforcement on 12 April 12 are equally unreliable. One crew member (Crew-1) claimed that "he understood Kerimov to be the owner of the AMADEA." However, another crew member (Crew-3) purportedly provided a contradictory statement that he believed Mr. Khudaynatov to be the owner of the AMADEA. Another crew member allegedly said that the AMADEA "had been transferred in a 'backdoor Russian' deal." This evidence is not only hearsay, but the sources are unidentified. Only Captain Zerr had access to ownership documents on board the vessel, and he provided those documents to law enforcement, conclusively demonstrating that the AMADEA is owned by Mr. Khudaynatov. Other crew members, as is typical on yachts of this nature, would not have firsthand knowledge of ownership, and would only be making assumptions based on who they see on the vessel (who could be charter guests and not owners) and rumor.

138. American counsels for Petitioner have since interviewed crew members of the AMADEA. Contrary to the allegations in the U.S. Request and the Bergen Affidavit, American counsel has been unable to locate one crew member who told the FBI and Fiji law enforcement that the AMADEA was owned by Mr. Kerimov. It appears that eight crew members were interviewed by the FBI: five in Fiji (consistent with the U.S. Request, which "named" these witnesses as "Crew-1" through "Crew-5" in their Request), and three in Los Angeles, California. Each of these eight crew members wrote contemporaneous notes of their interviews shortly after they took place. Not one of them indicated that they told the authorities that Mr. Kerimov owned the AMADEA. In fact, the three crew members in Los Angeles had their American visas revoked after refusing to say that Mr. Kerimov owned the AMADEA, which is what the FBI wanted to hear.

For US Authorities Evidence see Appeal Record Volume 4-4 at pages 1557 – 1558.

139. The rest of the evidence SA Bergen adduces does not equate to proof of ownership. For example, the Bergen Affidavit correctly states that Mr. Kerimov's adult daughter (Gulnara Kerimova) and her family have been guests on the AMADEA. Ms. Kerimova and her party were all unsanctioned individuals. And, there is no evidence that Mr. Kerimov ever chartered the vessel himself or was on it with his family members. That his adult daughter chartered the boat pursuant to a charter agreement does not equate to ownership. On the contrary, the language relied upon by SA Bergen is quite the opposite: these visitors are all expressly "guests" not "owners."[6]

140. In addition, the Bergen Affidavit states that the Kerimova party requested changes to the vessel as proof that her father owns it. However, it is not unusual in the industry for a charterer who pays millions of U.S. dollars to charter a yacht for a month, or potentially for longer-term charters as Ms. Kerimova was planning to do on the AMADEA, to request certain modifications at their own expense with the permission of the owner.

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[6] See for example Bergen paragraph 35 k, talking of codes for Kerimov and family as G0 to G5. G is for "guest": "Guest trip I... (previous Gs) ... Guest trip II.... New set of Gs...". SA Bergen leaps to describing the new "G"s as new **owners**; in fact, they are plainly only new "guests". Moreover, the use of code names like this is typical in the industry, not to hide ownership, but to provide privacy to charterers who are often ultra-high net worth and high profile.

For SA Bergen's Affidavit see Appeal Record Volume 4-4 at pages 1443 to 1546

141. The Bergen Affidavit assumes—without proof-- that Mr. Khudaynatov is not wealthy enough to own the AMADEA and another yacht, based on the fact that he was not listed in the Forbes billionaires list. Mr. Khudaynatov is a billionaire, even if he is not listed in Forbes. It is not unusual for very wealthy people to own more than one type of asset be it real property, artwork, cars or yachts. Indeed, multiple ownership of yachts happens not infrequently because of the resale and charter markets for them.

142. Finally, the Bergen Affidavit fails to provide proof that the purported evidence of sanctions evasion—a list of invoices addressed to Millemarin—is linked to Mr. Kerimov in any way. There is no evidence that Mr. Kerimov paid, attempted to pay, or was reimbursed for paying, any of the invoices or the payments listed in the U.S. Request or the Bergen Affidavit. If there is no evidence of sanctions evasion by a sanctioned individual, there is simply no evidence of criminality. Thus, the AMADEA is not tainted property.

143. This is the sum total of the evidence put forth by the Americans to claim that Mr. Kerimov owns the AMADEA. There is and there has been no other evidence apart from the evidence in paragraphs 111 to 118 on which the U.S. Authorities rely on to establish that the beneficial owner is Mr. Kerimov.

144. Not only is this evidence weak the suggestion that the *'Amadea'* is beneficially owned by Kerimov is predicated on whispers and hearsay.

145. In short, the DPP sought the order on the basis of at best throwaway hearsay comments from anonymous people who even by their descriptions are in no position to know whether what they are gossiping is true or not. None of the assertions made are tested since none of the names have been disclosed and no statements furnished other than an affidavit from an FBI officer whose job it is to implement the court order and, it would appear, ensure the Amadea is seized and transported to the US as soon as possible, away from the legal safeguards and protection of the jurisdiction

of this Honourable Court. This Court must not allow such US actions. There are no different to any other country.

146. The Petitioner submits that the High Court was required to consider the PCA and determine if the Amadea was tainted property. There was no such determination made by the High Court nor the Court of Appeal. If the High Court and Court of Appeal considered Section 19(B) they simply could not have satisfied that the test set out in the statute was met.

Ground 11

The Court of Appeal erred in avowing that the Court should not consider what steps the Attorney General might choose to take. If and insofar as this was intended to give free rein to the First Respondent to hand over possession of the Yacht to the US Authorities to sail her out of the jurisdiction, the First Respondent had no power so to do. This could not be done under a domestic restraining order. The course proposed amounts to converting a US seizure order first into a domestic restraining order and then back into a US seizure order. There is no basis in law for such an approach.

147. A restraining order might be considered a preliminary step for forfeiture. Once a foreign restraining order is registered in Fiji under MACMA, the foreign restraining order shall be deemed as a restraining order registered under the Proceeds of Crimes Act. A restraining order under the Proceeds of Crimes Act is only a preliminary restraint. A further application will need to be made to forfeit the property and for that the Court must be satisfied first that the property is tainted property. Again, there is no evidence that the Amadea is tainted property and after a full year the United States has made no attempt at proving it to be such.

Conclusion

148. Petitioner's UBO Mr Khudaynatov is an unsanctioned individual who expects to have the vessel returned to him from the United States authorities as there is no legal basis upon which the United States can continue to hold on to this asset.

149. For the foregoing reasons it is respectfully requested that the Court set aside the orders of the High Court and Court of Appeals so that Petitioner is no longer restrained from dealing with its property under Fiji law as a result of these erroneous orders, with an Order finding that:

(a) The High Court and Court of Appeals erred in permitting the U.S. seizure of the Amadea because the MACMA only Permits Restraints and Forfeitures, and not Seizures;

(b) The High Court and Court of Appeals erred by merely rubber stamping the United States' request and registering a foreign order without any exercise of discretion and review of the underlying basis of the foreign order; and

(c) The High Court and Court of Appeals erred by failing to review the underlying basis for the Seizure Warrant, as had it done so it would have found the factual basis woefully inadequate, and denied the United States' Request.

RESPECTFULLY SUBMITTED

DATED this 27th **day of** March, **2023**

Per:.....

Feizal Haniff

This Submission is filed by **HANIFF TUITOGA**, Solicitors for the Petitioner whose address for service is at their offices at 12 Vesi Street, Flagstaff, Suva.

IN THE SUPREME COURT OF FIJI

Civil Appeal No. CBV 06 of 2022

Petition for Special leave to Appeal from the Court of Appeal Civil Appeal No. ABU 24 of 2022 (High Court Civil Action No. HBM 57 of 2022).

BETWEEN : **MILLEMARIN INVESTMENTS LTD** having its address of service at Haniff Tuitoga, 12 Vesi Street, Flagstaff.

Petitioner

A N D : **THE DIRECTOR OF PUBLIC PROSECUTIONS** of 25 Gladstone Road, Suva, Fiji.

First Respondent

A N D : **SULEIMAN ABUSAIDOVICH KERIMOV**.

Second Respondent

PETITIONER'S SUBMISSIONS

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