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

CIVIL APPEAL NO. ABU 0096 OF 2006
(High Court Civil Action HBC 296 of 2006S)

BETWEEN : DANIEL URAI

Appellant

AND: PUBLIC EMPLOYEES UNION

1st Respondent

AND: THE ATTORNEY-GENERAL for THE REGISTRAR OF TRADE UNIONS and the MINISTER for Ministry of Labour, Industrial Relations and Productivity

2nd Respondent

Coram: Byrne, JA
Pathik, JA
Hickie, JA

Hearing: Wednesday, 2 July 2008, Suva

Counsel: H. Nagin for the Appellant
G. O'Driscoll for the 1st Respondent

Date of Judgment: Friday, 18 July 2008

JUDGMENT

BACKGROUND

[1] On 12 April 2006, the Executive Committee of the Public Employees Union (the First Respondent) received a nomination from DANIEL URAI (the Appellant) to stand for election for the post of General Secretary of the said

Union, a position which was to be decided by secret ballot at the First Respondent's Annual General Meeting to be held on 28 July 2006.

[2] The Executive Committee of the First Respondent met on 10 June 2006 and, amongst other matters, considered whether nominations were in order and in so doing rejected the nomination of the Appellant.

[3] In a letter sent on 13 June 2006 from the then General Secretary of the Union to the Registrar of Trade Unions asking for their assistance to supervise the secret ballot, the reason for the rejection of the Appellant's nomination was explained, amongst other matters to be, "that he is a General Secretary of another Trade Union".

[4] The view of the Office of the Registrar of Trade Unions on this issue had been contained in an earlier letter dated 5 June 2006 which had been sent to the General Secretary of the First Respondent in relation to the Registrar's interpretation of Section 31 of the *Trade Unions Act* (Cap 96), that is:

> *"Though Section 31(1) prohibits an Officer from holding Office in another trade union,* ***the Act does not prohibit a person who is an Officer of another trade union from contesting an Officer position in another trade Union****. Therefore, an Officer is at liberty to contest the post of Secretary in another trade union. However, if the Officer does succeed, then he or she must resign immediately before taking up the post in the other trade union."* (Our emphasis)

[5] Section 31(1) of the of the *Trade Unions Act* states:

> *"All the officers of every trade union shall be persons who have been and still are engaged or occupied for a period of not less than one year in an industry, trade or occupation with which the union is directly concerned, and* ***no officer of any such union shall be an officer of any other union*** *..."* (Our emphasis)

[6] On 12 July 2006, the First Respondent filed an Originating Summons in the High Court at Suva, seeking eight declarations and naming the Attorney-

General for the Registrar of Trade Unions and the Minister for the Ministry of Labour, Industrial Relations and Productivity as Defendant.

[7] Due to the urgency of the matter, judgment was delivered on 17 July 2006 with four findings made by the Trial Judge as follows:

> *"1. That under section 31 of the Act,* ***no person who already holds an office in a trade union may be eligible as a candidate for the office of another.***
>
> *2. That the Registrar of Trade Unions is obliged under law to attend and supervise the conduct of the ballots by a trade union, when notified under Regulation 10A.*
>
> *3. That the Registrar of Trade Unions [sic] powers in the conduct of balloting are limited to those prescribed by law, and specifically those set out in Regulations 10.*
>
> *4. That* ***the rejection of Mr Daniel Urai's name by the Executive Committee is in conformity with the requirement of section 31 (1) of the Act.***" (Our emphasis)

THE NOTICE OF APPEAL

[8] This Appeal is somewhat unusual as it has been made by **DANIEL URAI** who was not a party to proceedings in the High Court.

[9] On 11 August 2006, Mr Urai filed a Notice of Motion in the Court of Appeal naming the parties in the prior High Court proceedings as the First and Second Respondents respectively, that is, the Public Employees Union and naming the Attorney-General for the Registrar of Trade Unions and the Minister for the Ministry of Labour, Industrial Relations and Productivity who were the Plaintiff and Defendant respectively in the prior proceedings before the High Court.

[10] On 15 September 2006, Justice Scott (sitting as a Single Judge of the Court of Appeal) granted leave to Mr Urai to intervene and made him the Appellant in the Appeal.

[11] The two Grounds of Appeal to the Full Court of Appeal are as follows:

> *"1. The Learned Judge erred in law and in fact in not directing that Daniel Urai be made a party to the proceedings and be heard.*
>
> *2. The Learned Judge erred in law and in fact in not properly interpreting Section 31 of the Trade Unions of the Act."*

THE ISSUES

[12] The issues for consideration before this Court are thus:

(a) Whether the Trial Judge should have directed that the Appellant be made a party to the proceedings in the High Court as he would have been affected by what was sought; and

(b) Whether the Trial Judge was correct in his interpretation of Section 31 of the *Trade Unions Act,* that is, that the meaning that ***"no person who already holds an office in a trade union may be eligible as a candidate for the office of another"*** includes prohibiting of an Officer in one trade union from contesting an Officer position in another trade Union.

WHETHER THE APPELLANT SHOULD HAVE BEEN PART OF THE HIGH COURT PROCEEDINGS?

[13] As Counsel for the First Respondent submitted before this Court, it was not necessary for the Trial Judge to have ordered that the Appellant be made part of those proceedings for the following reasons:

(a) That the two parties involved in the High Court proceedings "were the only ones necessary to determine the issues sought by the First Respondent";

(b) That "The declarations sought did not have a direct effect upon the Appellant but only had an indirect inconsequential effect upon the Appellant;

(c) That the declaration which mentioned the Appellant by name "does not affect the Appellant any more or less than if the declaration had not been made";

(d) That "there has been no dispute by the Appellant as to the facts relied upon by the First and Second Respondents in the original proceedings";

(e) That "no other issues regarding the Appellant's nomination for General Secretary of the First Respondent, other than the ... interpretation of the Trade Unions Act, was the subject of the proceedings now being appealed against";
(f) That the only part of the Trial Judge's declaration being appealed against is the Trial Judge's interpretation of Section 31 of the Trade Unions Act.

[14] Interestingly, had the Trial Judge made the Appellant a party to the proceedings in the High Court (as he now claims he should have been), then, when he was unsuccessful in those proceedings, would he have been responsible for an Order for costs? Alternatively, one could imagine the scenario of his arguing that as he intervened in the proceedings at the behest of the Court why should he then be liable for costs? And if the Court had accepted such an argument, who then would have paid the First Respondent's additional costs of responding to what would have been a second plaintiff?

[15] Courts should be extremely careful inviting a third party to intervene in proceedings. This is far different than inviting a party to appear as amicus curiae. If a party is invited to intervene, it should be on the clear understanding that with such permission also comes the potential liability for costs being awarded against them.

[16] In addition, Courts have a responsibility to limit proceedings to those directly Involved in a dispute rather than expanding such proceedings to third parties who may be consequentially affected.

[17] In light of our comments above, this Court is of the view that the use of Order 15 Rule 6 (2) (b) of the High Court Rules should be done sparingly and only then with very good reason. It is also our view (for the reasons set out below) that this case was not one appropriate for a Judge to exercise his discretion and invite the Appellant to intervene. The Trial Judge was correct in not doing so.

[18] As for the granting of Leave to Appeal, Counsel for the Appellant cited to this Court both in his written and oral submissions para 59/3/2 from the 1988 White Book (*Supreme Court Practice*, Vol. 1, Sweet & Maxwell Ltd, London 1987) which states:

> *"Any party to the action may appeal ... and also any person served with notice of the judgment or order ... But in addition, in accordance with the old Chancery practice, any person may appeal by leave ... if he [or she] could by possibility have been made a party to the action by service (per Jessel M.R. in* ***Crawcour v. Salter*** *(1882) 30 W.R. 329 ...). It does not require much to obtain leave: a person making out a prima facie case that he is a person interested, aggrieved or prejudicially affected by the judgment or order and* ***should*** *be given leave, will obtain it." (Our emphasis)*

[19] Although Leave was granted on 14 September by a single Judge of Appeal, on the basis that "expense and time will be saved" and "that in the absence of an appeal by the Second Respondent ... the important legal matter at issue would not otherwise be resolved on appeal", with all due respect to His Lordship, the Appellant (for the reasons which also follow in this judgment) has arguably not been saved expense and time and further will now be liable rather than accepting the perfectly reasoned judgment of the High Court to which he was not a party.

[20] This Court is of the view that Leave should be granted sparingly in such matters save and when it can be clearly shown to the Court by way of Affidavit evidence that a third party has a legal interest and a grave injustice has occurred which requires full argument before the Court of Appeal by way of remedy to see if the Trial Judge fell into error by not inviting the party to intervene in the High Court proceedings.

[21] Counsel for the Respondent conceded in oral argument before this Court that if the above citation by Appellant's Counsel from the 1988 White Book was correct, then Scott J sitting as a single judge of Appeal was correct to have granted leave to Mr Urai to intervene and make him the Appellant in the Appeal.

[22] The Court has considered para. 59/3/2 from the 1988 White Book in its entirety and notes that the following cases were also cited therein:

(a) ***Re Youngs, Doggett v Revett*** (1885) 30 Ch.D. 421 – where a residuary legatee of an estate was refused leave to appeal from a decree against the executor at the suit of a creditor as Cotton LJ explained at page 430:

> *"The personal representative of a deceased person is, as against persons claiming to be creditors against the estate of the deceased, the person to represent the estate, and in any proceeding by a creditor the legal personal representative represents all persons beneficially interested in the estate other than the creditors. Any judgment against him at the suit of a creditor will bind those persons, because it binds the assets."*

(b) ***The Millwall*** [1905] P. 155 at 162 – the Court of Appeal held that a third party could not appeal a judgment for liability between a Plaintiff and a Defendant (even though the latter in separate proceedings then obtained orders for the third party indemnifying the Defendant in respect of the damages recovered by Plaintiffs against the Defendant). In that case, however, as Collins MR noted at page 164: *"... no order has been made determining that the third parties ... were bound by the judgment in the action, and therefore ... there is nothing binding [the third parties] ...by the result ..."*;

(c) ***Re Hambrough's Estate, Hambrough v Hambrough*** [1909] 2 Ch 620 pp. 625-626 – the pages which have been cited from this case in the 1988 White Book are the arguments of Senior Counsel where it was submitted that an order was binding upon an infant although not party to proceedings concerning an estate and thus needed an order that prior orders were without jurisdiction and thus of no effect. Rowden KC submitted:

> *"Although not a party to it he [the infant] might have appealed from it. The only difference as regards appeals between the case of a person who is a party to an order and that of a person who is not is that in the latter leave to appeal in necessary ...'**The test, in such applications as these, is, could or could not the applicant by possibility be made a party to the action by service?**': per Jessel M.R. in **Crawcour v Salter**"*

Warringtron J was recorded as replying: "Service there means service of the judgment";

(d) ***Re B (an infant)*** [1958] 1 QB 12; [1957] 3 All ER 193 – was a case where a court had dispensed with the consent of the mother in making an Order for adoption. The mother appealed against the Order and was granted leave by the Court of Appeal to bring an appeal against the adoption Order, the appeal was allowed. In Ordering that the case be referred back for rehearing, Lord Evershed MR noted:

> *"Bringing a matter of this kind to the Court of Appeal is likely to involve a good deal of expense. The rules of this court as to leading fresh evidence are of long standing and strict. Prima facie, evidence cannot be adduced in this court which was not before the court below; and before additional evidence is adduced, the leave of the court (in general) has to be obtained. There can, I think, be no objection to the evidence that was put before us here ... But I do suggest that considerable caution and discretion should be exercised in adding to the costs by making a number of affidavits at this stage. It seems to me that, at any rate, in anything but a very exceptional case, this court could do no other than (if it thought appropriate) discharge the order made and send the case back for further adjudication. In other words, I think – again always except in some very unusual case – that it would not be right for this court (which has not the opportunity of seeing the persons concerned and so on) itself to make orders."*

[23] The Court further notes that para. 59/3/2 concludes: **"But a person who has no 'legal interest' in the proceedings cannot be a party to an appeal"** and refers the reader to "para. 59/8/1 and the cases there cited".

[24] Para. 59/8/1 states:

> *"... someone who has no legal interest, but is merely a person who would be affected either commercially or in some other respect by the outcome of the appeal cannot be joined as a party (see* ***Re I.G. Farbenindustrie A.G. Agreement*** *[1944] Ch 43 ... and* ***Spelling Goldberg Productions v BPC Publishing Ltd*** *[1981] RPC 280 ..."*

[25] ***Re I.G. Farbenindustrie A.G. Agreement*** involved an application by a third party company (Boots), which was granted, to be added as respondents in proceedings between an English company (Bayers) and a German company

(I.G. Farbenindustrie A.G.) whereby the former (Bayers) was seeking a vesting order in respect of royalty payments from certain patents due to the latter (I.G. Farbenindustrie A.G.) during the Second World War. The third party (Boots) had a licence for some of the patents and were to be making royalty payments. In allowing the appeal and overturning the joinder order of the lower court, such that the third party (Boots) was struck out as one of the respondents, Lord Greene MR explained at pages 43-45:

> *"... a right in a licensee has nothing to do with the subject-matter of these proceedings which relate solely to the legal title to these patents. Ought that title to be vested in Bayers, or ought it to remain vested in I.G.? Whichever way that question is answered, the position of Boots cannot be affected from the legal point of view. When I say 'Legal interest' I am not thinking of any distinction between a legal and an equitable interest, but of an interest which the law recognizes ...*
>
> *.... That they (Boots) had a commercial interest is beyond dispute ... that they will now have to render accounts to a trade competitor ... was a commercial risk which Boots took when they applied for and obtained the licence and prepared to trade on the strength of it ... The fact that a person has a merely commercial interest in litigation gives him [or her] no right to demand to be added as a party to proceedings by the result of which that commercial interest may be affected, and the court has no jurisdiction to add him [or her] any more than it has jurisdiction to add any man [or woman] in the street ...*
>
> *... the arguments relate solely to the question of title as between Bayers and I.G. In that question Boots have no concern in law. That being so, they have no locus standi to be added, nor has the court any power to add them ...*
>
> *... if the principle on which the learned judge acted were to be followed it would mean that many persons would be added to litigation in which they had no interest except a commercial interest, and that would establish a precedent which is not justified by any authority and, in my opinion, would be most unfortunate. In the present case, why should the matter stop at Boots? We are told that many licences have been granted in respect of those patents. Why should Boots have the privilege alone of putting these matters forward? Why should not some other licensees be heard to say that they had some other argument which they wished to place before the court? If Boots had been joined as parties to this summons there would be no answer to applications by other licensees."*

[26] In ***Spelling Goldberg Productions v BPC Publishing Ltd*** (supra), four parties sought leave to intervene to be made parties to a pending appeal between the producers of a television series and a publishing company where it was alleged that the latter had infringed the former's copyright by reproducing a frame from the plaintiffs' films in a "pin-up" poster and "a magazine-type publication" which they had obtained from third parties, namely, a television station (the BBC), and some photographic agencies. As Lord Justice Bridge noted at pages 281-281:

> *"As I understand it ... [a single judge of the Chancery Division] held that certain matters published by the defendants did not constitute an infringement of copyright ... What the interveners say is that they are also film makers and that they are interested in the question of what material taken from their films can be published with impunity and without risk of infringing their copyright in the same manner ... there is no question or issue arising between ... the interveners, and either of the parties to the pending appeal in this court ...*
>
> *... the interest of the interveners is solely an interest in the outcome of the appeal in so far as it determines a question of law which may affect the interveners' business in future ... In those circumstances one has to consider whether this case falls within the ambit of R.S.C. Order 15, rule 6 (2) ...*
>
> *In my judgment the construction of that provision gives no difficulty at all and what is clearly contemplated is a situation in which the rights of the party seeking to intervene in the proceedings may depend ... Clearly what is contemplated is that, at the time when an order for joinder is made under this provision, the question or issue arising out of, or relating to, or connected with the relief or remedy claimed in the cause already arises between the party seeking to be joined and one or other of the existing parties to the litigation."*

[27] In the same case of ***Spelling***, Lord Justice Cumming-Bruce went further stating at page 282 that Order 15, rule 6 (2) is a two-stage process such that even if a proposed intervener passes the first hurdle of jurisdiction, the second test concerns whether "it would be just and convenient" to allow them to join as interveners, and in his view he would, on the facts of the above case, "as a matter of discretion", refuse.

[28] R.S.C. Order 15, rule 6 (2) is the same wording as Order 15 rule 6(2) of the High Court Rules of the Fiji Islands. We return to the citation by Counsel for the Appellant of para 59/3/2 from the 1988 White Book and the reference to *"per Jessel M.R. in **Crawcour v. Salter** (1882) 30 W.R. 329"*, which, on its face, Counsel for the Respondent conceded was not a very high test and perhaps why Scott J granted leave. Leave having been garnted, Counsel for the Respondent, therefore, based his argument on the submission that the Trial Judge was correct in his interpretation of Section 31 of the Trade Unions Act.

[29] The Court has now had the benefit of reading ***Crawcour v. Salter*** in its entirety. What was in fact said and why is quite illuminating. It was reported in Vol. 30 of *The Weekly Reporter* on 25 February 1882, at page 329. It was an ex-parte application seeking leave from the Master of the Rolls to appeal to the Court of Appeal from an order of a single judge "directing" that proceeds from the sale of a hotel "be paid out to the plaintiffs, and discharging the receiver without passing his accounts". After the receiver had been appointed and the hotel business was still operating prior to sale, a third party (Messrs Ind and Coope) had supplied beer to the hotel but their account remained unpaid. Rather than taking action against the receiver of whom "it was stated ... was a poor man and not worth suing", the third party (Messrs Ind and Coope) "applied ... for leave to appeal from the ... order" of the single judge. This is why Jessel MR then held:

> *"You have no interest in the action. **The test**, in such applications as these, **is, could or could not the applicant by possibility be made a party to the action by service?** You could not possibly be made a party; and the application must therefore be refused."* (Our emphasis)

[30] This Court would suggest that the above test from ***Crawcour v. Salter*** is somewhat different than that which was argued in the submissions filed as well as in oral argument before us. We would also hold that Jessel MR was correct and over some 126 years later his decision is still good law.

[31] As the Respondent has not sought to appeal Scott J's granting of leave, we could just record that this Court rejects the first ground of appeal, that is, *"The Learned Judge erred in law and in fact in not directing that Daniel Urai be made a party to the proceedings and be heard."* Having considered the matter further, however, **we are of the view that this Court must record our view that Scott J's Order to grant leave was incorrect.** Indeed, so as to avoid, Scott J's decision being used as a precedent for similar applications to this Court, we must formally record that "Leave should not have been granted". If the First Respondent had made formal application to us appealing the Order granting Leave, we would have allowed their appeal with costs.

[32] To be fair to Scott J, as he noted at paragraph 11 of his judgment:

> *"Ms Qionibaravi [for the Second Respondent] did not object to the application, in fact she supported it: the Registrar of trade unions would welcome a definite decision of the Court of Appeal on the meaning and effect of Section 31 (1) of the Act."*

[33] The submission of Counsel for the Second Respondent was incorrect. If the Second Respondent felt that the judgment of the Trial Judge was wrong at law then they should have appealed rather than waiting for a third party to "take up the cudgels", so to speak, and be liable for significant costs of the appeal.

[34] Thus we agree with the submission of Counsel for the First Respondent outlined by Scott J at paragraph 12 of his judgment:

> *"Mr. Kofe [for the First Respondent] opposed the application. He suggested that the proceedings were commenced in the High Court because of a dispute between the Union and the Registrar. Therefore, Mr. Urai was not directly but consequentially affected. Mr. Kofe submitted that the proper course now was for the Applicant to initiate proceedings by way of judicial review."*

[35] Scott J rejected this submission stating at paragraph 13 of his judgment:

> *"In my opinion there is nothing to be said for commencing entirely fresh proceedings when there are already well advanced proceedings afoot which may easily and swiftly yield a definite result. By permitting the Applicant to join the proceedings at this stage expense and time will*

> *be saved. I am satisfied that the Applicant has a legal interest in the outcome of the appeal and that in the absence of any appeal by the second Respondent to this application the important legal matter at issue would not otherwise be resolved on appeal."*

[36] This court must respectfully disagree with Scott J's analysis for the following reasons:

(a) First, *"expense and time"* have not been saved. The Judicial Review proceedings suggested by Counsel for the First Respondent would probably have been far quicker and far less expensive for the Appellant;

(b) Second, the Court doubts whether *"the Applicant has a legal interest in the outcome of the appeal"*. ***Re I.G. Farbenindustrie A.G. Agreement*** (supra) would suggest not while Lord Justice Cumming-Bruce in ***Spelling Goldberg Productions v BPC Publishing Ltd*** (supra), suggested that even if the Appellant passed the first hurdle of jurisdiction, he would need to convince the Court that "it would be just and convenient" to do so;

(c) Third, it was incorrect to hold that an *"in the absence of any appeal ... the important legal matter at issue would not otherwise be resolved on appeal"*. The matter had already been resolved by the trial Judge in the High Court. Such a view as suggested by Scott J is only an encouragement to litigation and firmly rejected by the Court. It was for the Second Respondent, if they felt that the judgment of the Trial Judge was wrong at law, to appeal rather than leaving it to a third party with a doubtful legal interest.

[37] Again to be fair to Scott J, it was not necessary for the First Respondent to have sought the fourth prayer for relief, that is, *"That the rejection of Mr Daniel Urai's name by the Executive Committee is in conformity with the requirement of section 31 (1) of the Act."* The First Respondent already had three findings confirming that it was correct in its view as the legal interpretation of Section 31, that the Registrar of Trade Unions was now obliged to attend and supervise the election and that the Registrar's powers were restricted solely to that purpose. Perhaps, the fourth prayer just caused some confusion for Scott J even though this was not the case for the Trial Judge. The finding had the

potential to affect many people in the future, even if for the Appellant it was more immediate. **It does not follow, however, that he should have been granted leave to intervene or that the Trial judge at first instance *"erred in law and in fact*** *in not directing that Daniel Urai be made a party to the proceedings and be heard".*

[38] Thus, for the reasons outlined above, the Court rejects the First Ground of Appeal.

WHETHER SECTION 31 PROHIBITS AN OFFICER IN ONE UNION FROM CONTESTING AN OFFICER POSITION IN ANOTHER TRADE UNION?

[39] Turning to the Second Ground of Appeal, concerning the Trial Judge's interpretation of Section 31 of the *Trade Unions Act*, and whether it prohibits an officer in one union from contesting a similar position in another union, we agree with the written submissions of the Respondent, and in particular, adopt the following reasoning:

(a) That *"if an officer of one trade union were to stand for election in an office of another trade union and were to win that position, if and until that officer resigns from their initial union post they will be part of two trade unions at once which is specifically prohibited under section 31 of the Act";*

(b) That *"if the intention were [otherwise] ... we would have to read into the legislation as an additional phrase such as:*

> *'If an officer of one union is elected as an officer of another union, that officer must immediately resign its former post'";*

(c) That *"to give effect to the interpretation put forth by the Appellant may lead to an absurdity. For example, if after the election and the officer wins ... then subsequently decides to stay on in his or her original position with the other union, the whole AGM would have been an exercise in futility ... Another example could be that upon winning the election, the officer resigns but is required to give some form of written notice to the first union for some period*

before the employment is terminated. Thus being an officer of more than one union at once ...";

(d) That *"to interpret section 31 otherwise would be to invite 'mischief' and absurd circumstances";*

(e) That *"the purpose of section 31 ... is to ensure that officers of a union have a significant interest in that union";*

(f) That *"the draftsman in all probability overlooked the possibility that a secretary of one union would want to move over to become the secretary of another union, but in the process, did not want to relinquish* the original *position until success was assured in the second union";*

(g) That *"had Parliament's attention been drawn to the omission, they would have inserted [an amendment] ... or alternatively ... added a provision such as the following:*

> *"'A person who holds an officer's position in a union is deemed to have vacated that office immediately before the time at which his or her signed nomination as a candidate for election as an officer in another union is delivered to the returning officer.'"*

[40] For the Court to attempt to remedy any perceived defect in the section would be to go far beyond correcting a plain case of a drafting error (see ***Inco Europe v First Choice Distribution (a firm) and others*** [2002] 2 All ER 109; and ***Jones v Wrotham Park Settled Estates*** [1979] 1 All ER 286).

[41] For the above reasons, the Court also rejects the Second Ground of Appeal.

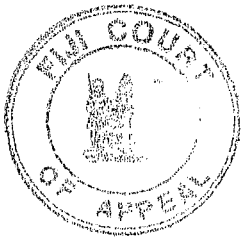
ORDERS

[42] Accordingly, the Court makes the following Orders:

1. **That the Appeal is refused.**

2. **That the Appellant is to pay the Respondent's costs of the Appeal fixed in the amount of $3,000 within 28 days.**

Byrne , JA



Pathik, JA

Hickie, JA

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