

IN THE COURT OF APPEAL

SUVA, FIJI

(Miscellaneous Action No. 011 of 2008)

BETWEEN : AIRPORTS FIJI LIMITED

APPLICANT

AND : AIR PACIFIC LIMITED

RESPONDENT

**BEFORE THE HONOURABLE
JUSTICE OF APPEAL : Mr. JUSTICE JOHN E. BYRNE**

COUNSEL : M^{rs}. A. BALE (For the Applicant)

: F. HANIFF (For the Respondent)

**Date of Hearings and
Submissions : 25th September 2008**

Date of Ruling : 5th August 2009

**RULING ON APPLICATION FOR LEAVE
TO APPEAL OUT OF TIME**

2.

1. The Applicant applies to this Court for leave to appeal out of time the judgment of Singh, J delivered in the High Court on the 9th of May 2008 by which the applicant's action by originating summons against the respondent was dismissed with costs.

2. The Applicant had sought declarations from the High Court first whether it was required under the Civil Aviation (Security) Act 1984 to provide security services including passenger and baggage screening at International Airports in Fiji and secondly whether the respondent was entitled to retain a sum equivalent to what it expended in providing the passenger and baggage screening at the International Airports. The Trial Judge found for the respondent in both the declarations and ordered on the counter-declarations sought by the respondent that:
 - (i) *the applicant is required under the Civil Aviation (Security) Act to provide security services including passenger and baggage screening at International airports in Fiji;*

 - (ii) *the respondent is entitled to retain a sum equivalent to what it expended in providing passenger and baggage screening at the international airports.*

3. The Applicant, through its former Solicitors, then sought legal advice from Counsel in Australia on the possible chances of success in appealing the judgment.

4. It actually received opinions on the chances of success of any appeal from overseas counsel and said that it required time to further consult with such counsel with a view to ascertaining which of the advice received was in the best interests of the applicant.

5. **THE TIME FOR APPEAL**

The applicant had six (6) weeks from the 9th of May 2008 to appeal against Singh, J's judgment, that is until the 17th of June 2008. This was not done and it was not until the 1st of September 2008 that the applicant filed a Notice of Motion for leave to appeal out of time which is now before me. This represents a delay of about two and a half (2 ½) months from the date the Notice of Appeal should have been given.

6. The Notice of Motion states that on the hearing the applicant would rely on an affidavit of Davina Chang-Ligaiula whereas in fact the affidavit relied on was sworn by Chaminda Ratnayake sworn on the 27th of August 2008.

7. There are no grounds of appeal proposed or otherwise in the affidavit of Chaminda Ratnayake. However financial reasons are given as to why the applicant should be given leave to appeal. Shortly stated these are that implementing the decision of Singh, J would place a severe strain on the company's finances particularly on one of the company's main revenue streams, which I do not consider a very strong ground in as much as most decisions or judgments have financial implications.

8. I will return to this subject shortly but here must remark on a document on the court file dated the 20th of May 2008 entitled Notice Grounds of Appeal and purported to be signed although only in the form of a rubber stamp by Davina Chan-Ligaiula.

9. This document lists two grounds of appeal namely:

- (i) that the Trial Judge erred in finding that the Defendant(respondent) was entitled to retain a sum equivalent to what it expended in providing the passenger and baggage screening at International Airports here in Fiji;
- (ii) that the Learned Trial Judge erred in law in not finding there is no contractual or other right on the part of the Respondent to withhold the security charge from the appellant or otherwise be paid in respect of the security screening services performed by it.

10. No reference was ever made in argument to this document and indeed the Respondent relied on the failure of the Applicant to provide the Court with any proposed grounds of appeal if leave were given to file the appeal out of time. The Respondent submits therefore that the Court is in no position to assess the applicant's chances of succeeding on appeal. It is in no position to assess whether the overall justice of the case requires that an opportunity be given to attack the judgment from which it is sought to appeal. It is then submitted that this Court must adopt the principle than on an appeal there is a presumption of correctness of the decision of the court below and it is for the Applicant to satisfy the court otherwise.

11. No attempt was made by M^{rs} Bale who appeared before me to answer this argument. She preferred simply to rely on her written submissions which in substance argue first that there was a reasonable explanation for the failure to file a Notice of Appeal in time and secondly that the Respondent will not suffer any severe prejudice if leave were granted to appeal out of time. It is said that the respondent will not suffer any loss either in terms of money or time as it will not be obliged to perform anything it is not currently performing merely through the grant of leave nor will it be prevented from conducting its core business function.

If anything, it is said, it is the applicant who is prejudiced as the respondent is holding back payment of security charges levied as expenditure it claims it has incurred from screening each passenger and their luggage because the current security services provided by the applicant do not go far enough.

Then it is said that on a wider level the degree of prejudice to the applicant will be even greater if the other airline companies which use the International Airport started following suit and with-held from the applicant such money which should be rightfully paid to it as a security for the services which they feel should be provided for by the applicant.

12. If all other things were equal there might be some merit in this argument. I note the remark by Shameem, J in *Registrar of Titles v. Sharda Prasad [Civil Appeal No.9 of 2001]* where in granting leave to appeal out of time Her Ladyship stated at page 3 of her ruling:

".....However, I accept the submissions of counsel for the Appellant that the appeal is not necessarily doomed to failure, and that he has at least an arguable case that the commercial loss to the Respondent calculated on the basis of the improved value of the land should not have been awarded to him..".

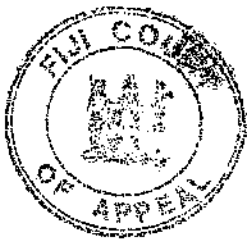
13. In my opinion, that case is distinguishable on its facts from the instant case because :
- (i) First, a Notice of Appeal had been filed so that Shameem, J was able to form some opinion of the strength of the Appellant's case, and there is none such here .
 - (ii) Second, the respondent had already been paid the sum of \$125,000.00 on account of damages which I as a Judge of the High Court had assessed at \$225,000 pursuant to an order which I made to do so.

14. In the circumstances Her Ladyship held that the part-payment of \$125,000.00 to the respondent alleviated to some extent, the prejudice that it might have suffered if the appeal proceeded after a delay of twelve (12) months.
15. In this case I consider no satisfactory explanation has been given for the filing of a Notice of Appeal out of time. I say that for a number of reasons.
- First, a Notice of Appeal could have been filed within time and then withdrawn if it was decided by the Applicant not to pursue it. The Applicant's legal adviser obviously contemplated this in preparing Notice on Grounds of Appeal but nothing was ever said in argument about this and I must therefore ignore it.
16. Secondly, Counsel for the Applicant informed me that she had no instructions as to why the Applicant's Board could not convene before the 30th of June 2008. It would appear that Ms Bale or her predecessor for the Applicant did not even ask the Applicant why a meeting could not be convened before that date. I cannot understand why a meeting could not have been convened by a telephone hook- up. Mr. Haniff told me that many Board decisions are made by Flying Minutes but whether or not this is true I do not know. Regardless of this, it seems to me that the Applicant considered this Court should await its pleasure, which it will not.
17. In my judgment the Applicant had ample opportunity to file a Notice of Appeal in time and I do not accept the reasons it gives for not doing so. I cannot understand (and no reason has been suggested by the applicant) for the delay of two and a half months in filing its notice of motion for leave to appeal. In my judgment an explanation should have been given if there was one, but no attempt was made to do so.

7.

18. Furthermore no reasons have been given by the applicant as to how Mr. Justice Singh erred. The Rules of Court are made to be obeyed unless good reasons can be shown for not so doing. The applicant has not provided any such reasons in this case.
19. **I therefore dismiss the Motion for leave to appeal out of time and order the Applicant to pay the Respondent's costs which I fix at \$1000.00.**

Dated this 5th day of August 2009.



A handwritten signature in cursive script, reading "John E. Byrne".

JOHN E. BYRNE
JUDGE OF APPEAL