

IN THE COURT OF APPEAL

SUVA, FIJI ISLANDS

MISC. APPEAL NO. AAU0017/2008
(CIVIL ACTION NO. HBC 0016/2007)

BETWEEN : MOKOSOI PRODUCTS FIJLLTD
(APPLICANT)

AND : PURE FIJI EXPORT LIMITED
(1ST RESPONDENT)

AND : ADMINISTRATOR GENERAL OF FIJI
(2ND RESPONDENT)

AND : ATTORNEY GENERAL OF FIJI
(3RD RESPONDENT)

BEFORE THE
HON. JUDGE OF APPEAL : MR. JUSTICE JOHN E. BYRNE

COUNSEL : M. PRASAD (FOR THE APPLICANT)
: J. APTED (FOR THE 1ST RESPONDENT)
: NO APPEARANCES FOR THE 2ND AND 3RD RESPONDENTS

DATES OF HEARING
AND SUBMISSIONS : 21st August 2009

DATE OF RULING : 7th September 2009

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

INTRODUCTION

[1.0] This is an application by Mokosoi Products Fiji Limited ("**MOKOSOI**") for an extension of time to appeal against a judgment by Mr. Justice Singh in the High Court on the 17th of October 2008.

1.1 The judgment dismissed an application by MOKOSOI in the High Court under Section 34 of the Trade Marks Act Cap 240 to expunge the registration by the second respondent, the Administrator-General of Fiji, in her capacity as the Registrar of Trade Marks, ("**THE REGISTRAR**") of a trademark in favour of the 1st Respondent, Pure Fiji Export Limited ("**PURE FIJI**") under Part III of the Act, and for orders that the application be advertised for opposition by Mokosoi.

1.2 Part III of the Trade Marks Act allows for the registration in Fiji of Trade-Marks registered in the United Kingdom upon the application by the Registered United Kingdom Proprietor upon lodgment of prescribed documents. It is to be contrasted with registration of a trade mark under PART II of the Act, which provides a detailed procedure for the advertisement of trade mark applications, the filing of oppositions and examination by the Registrar.

1.3 The most relevant section in Part III for the purposes of this application is Section 57 which provides –

*"Certificate to issue
57. Upon such application being lodged together with the documents mentioned in Section 56, the Registrar shall issue a certificate of registration"*

1.4 If granted leave, Mokosoi also seeks a stay on execution and further proceedings on the Judgment, pending the hearing and determination of the Appeal.

[2.0] THE APPLICATION AND THE AFFIDAVIT EVIDENCE

The application was filed on 18th December 2008 with an affidavit in support by Kenneth Adrian Roberts, the Chairman of MOKOSOI's Board of Directors, sworn on 11th December 2008 ("THE ROBERTS' AFFIDAVIT").

[3.0] THE JUDGMENT

Relevant Facts

3.1 The relevant facts appear in summarized form in the judgment which, I interpolate here, I consider very practical in its comments and statement of the law on this subject.

PRELIMINARY COMMENTS ON PROPOSED GROUNDS OF APPEAL

3.2 Before discussing the judgment however, it is desirable first to mention that the Summons seeking leave to appeal was filed on the 5th of February 2009. Annexed to the supporting Affidavit of Kenneth Roberts were ten proposed Grounds of Appeal. I feel compelled to say that for turgid prose and in several instances very questionable grammar they would be difficult to better. Many of the grounds contain long sentences which tax the reader's patience because of their convoluted expression and syntax, such that at times when reading them I wondered whether their author had forgotten the basic rule of grammar that every sentence must contain a subject, verb and predicate.

3.3 In any Court but, particularly in an Appellate Court, it is a fundamental principle of practice that all submissions filed by the Parties to any proceedings in the Court must first be as simple as the circumstances permit, secondly accurate in their statement of facts and thirdly demonstrate a good knowledge of the relevant law.

3.4 I regret to say that the Applicant's proposed Grounds of Appeal leave much to be desired in these respects.

- 3.5 They are such that I felt it necessary when reading them first to rephrase them at least for my own satisfaction in simpler and more readily understood terms. No Judge should have to do that and I trust that for the better legal education of the author of these grounds he or she will not make the same errors again.

[4.0] **LENGTH OF DELAY**

- 4.1 It is not disputed that the delay in filing the present application was eleven (11) days based on the then method of computing time for filing a Notice of Appeal under Rule 16 of the Court of Appeal Rules.
- 4.2 The Judgment was delivered on 17th October 2008 and perfected on the 27th of October 2008 so that the time for appealing was six weeks from that date namely 8th December 2008.
- 4.3 On 19th December 2008 the Applicant filed its present application for leave and so was 11 days out of time.
- 4.4 The reasons given for the delay, which were accepted by the First Respondent, were the recent marriage of Counsel for the Applicant which prevented Kenneth Roberts from giving Mr. Prasad instructions as swiftly as he would have liked.

[5.0] **EXTENDING THE TIME TO APPEAL**

The Court of Appeal Rules

- 5.1 Although an amendment to the Rules has subsequently taken effect as a result of the Supreme Court over-ruling the Decision of Hickie, J.A on 12th August 2008 in *Pacific Agencies (Fiji) Ltd v. Spurling (2008) FJCA 49* in its judgment 2008 (FJSC 27) delivered on the 17th of October 2008, the former rule that time ran from the date of perfection of the judgment still applied to this case.
- 5.2 Although **PURE FIJI** concedes that the reasons for the delay here were perhaps understandable it argues that is not the only factor which I have to consider on this application and I will return to this subject later after discussing the judgment of Singh, J.

5.3 He first stated the relevant facts in paragraphs 1, 13, 23, 24 and 26 of his judgment.

I now summarize these, dealing first with the issue of registration:

REGISTRATION

- (a) **Mokosoi** and **Pure Fiji** are rivals in the selling of beauty products.
- (b) In 2006, the Registrar registered Pure Fiji as the proprietor of Trade Mark No. 50 / 2006 comprising the words "**PURE FIJI**" and a frangipani device.
- (c) This registration was under Part III of the Act.
- (d) The Registration of Trademark 50/2006 occurred without prior advertisement of Pure Fiji's application, and without an opportunity for Mokosoi to oppose its registration.

THE ADVERTISEMENT PRACTICE IN ISSUE

- (e) Earlier in 1996, the Registrar had advised Mitchell Keil and Associates (who are Solicitors for Mokosoi in the present application but were not acting for Mokosoi at the relevant time) that he had decided that Part III Registrations had to be advertised under Rule 5 of the Trade Marks Rules, but that they did not require "examination" and were "Not contestable" before the Registrar.
- (f) The Registrar had advised that the required advertisement had only to display the trademark and notify the conditions of its United Kingdom registration and its extension to Fiji (paragraph 24).
- (g) The Registrar's letter also advised of the right of persons, whose interests were prejudicially affected by a registration, to apply to the High Court for relief under Section 61 (paragraph 24).
- (h) Evidence was tendered of advertisements of Part III Registrations after 1996. There was no evidence that there was any uniform practice in the form of advertisement for Part III registrations, but the majority of those tendered in evidence, including advertisements by Mitchell Keil, did not invite oppositions (paragraph 26).

- (i) In any event, the Registrar's practice as advised by him to Mitchell Keil did not itself permit oppositions to Part III registrations (paragraph 25).

THE EARLIER TRADE MARK APPLICATION BY SANDOLLARS

- (j) Previously in 2000 another company, SANDOLLARS (Fiji) Limited ("SANDOLLARS") owned by the majority shareholder in Pure Fiji Ms Gaetane Austin who is also a Director and Company Secretary of both companies had applied to the Registrar under Part II of the Act for the registration of a Trade Mark (143/2000).
- (k) Under the provisions of Part II of the Act (which requires advertisement and allows for opposition) Sandollars' application 143/2000 was advertised for opposition on 2nd August 2002 (paragraph 6).
- (l) Mokosoi filed an opposition claiming among other things that the proposed mark lacked "distinctiveness", being a quality that goes to registerability.
- (m) Although it was incumbent on Sandollars to file a Counter Statement to the opposition failing which its application would be deemed abandoned, it did not do so, and instead Pure Fiji filed the counter-statement (paragraph 6).
- (n) A hearing took place before the Registrar in 2003 but no decision of the application was ever given.
- (o) It was accepted by the Learned Trial Judge, that due to the departure of relevant personnel from the Registrar's office, no decision was likely to be delivered on Sandollars' application.

THE ISSUES BEFORE THE HIGH COURT

5.4 It is vital to note that in the High Court Mokosoi sought orders to this effect:

- (a) the registration of Pure Fiji as proprietor of trade mark be expunged;

- (b) that Pure Fiji's application under Part III be advertised;
- (c) that Mokosoi thereafter have the opportunity to oppose Pure Fiji registration under the provisions of Part III of the Act.

5.5 The grounds relied on by Mokosoi were that -

- (a) The Registrar erred in registering the trade mark under Part III because there was a pending opposition by Mokosoi to Sandollars' earlier application for an "identical trade mark";
- (b) The Registrar had wrongly decided that the two trade marks were not identical and therefore should have refused registration under Sections 18 and 19;
- (c) The Registrar had failed to comply with Rule 5 of the Trade Marks Rules which requires advertisement of a Trade Mark application, thereby depriving Mokosoi of the right to oppose the registration of the Trade Mark by Pure Fiji.

5.6 Central to Mokosoi's case was a practice introduced by the Registrar in 1996 of requiring Trade Mark Applications under Part II of the Trade Marks Acts to be advertised under Rule 5. I note that although the Trade Marks Act and Part III registrations date back to 1933, this practice was not introduced until 1996. It was argued that the failure by the Registrar to require Pure Fiji to advertise its Part III Trade Mark under Rule 5 had deprived Mokosoi of its right to oppose Pure Fiji's Trade Mark, especially as Mokosoi had opposed Sandollars' earlier application for what Mokosoi claimed was an identical mark.

[6.0] **HIGH COURT'S FINDINGS**

The High Court found that:-

- (a) The earlier application was a Part II application by Sandollars which was advertised as required for such application in 2002.

- (b) It was opposed by Mokosoi.
- (c) A counter-statement was filed by Pure Fiji instead of Sandollars.
- (d) In any event, a hearing took place before the Registrar in 2003 but at the time of the judgment in October 2008 there was still no decision on the application first made by Sandollars in 2000 (paragraph 6).
- (e) The Judge remarked at paragraph 7 that the officers who had heard the parties in Trade Mark 143/2000 were no longer with the Administrator General's Office so it was unlikely that a decision would ever be delivered.
- (f) After the Hearing the parties continued their business as usual after the registration of the Trade Mark.
- (g) The Judge found as a fact that the two marks were not identical although there were some similarities between them.

[7.0] It had been submitted to Mr. Justice Singh that as there had been a hearing, the application could not have been deemed abandoned under Section 13(3) of the Act. The Judge found it unnecessary to consider the submission in the absence of the actual records of the Hearing, but he asked rhetorically in paragraph 11; "If the application was not deemed abandoned as Mr. Prasad submits, then how long is an applicant expected to wait for a decision? The world of commerce and private enterprise does not move at the leisurely pace of government bureaucracy. It moves at a far more efficient pace".

[8.0] With respect I agree. The purpose of Trade Mark Registration is to avoid consumer confusion. As the Registrar was acting too slowly on the original application, Pure Fiji had the right to explore other more efficient means of achieving registration to protect its business.

- [9.0] The core issue before the Judge was whether Pure Fiji's trademark should have been advertised before it could be registered under Part III. The Judge found, and I agree, that it need not have been advertised.
- [10] The Judge based his decision on Section 57 which states that "Upon such application being lodged together with the documents mentioned in Section 56 the Registrar shall issue a Certificate of Registration". The Judge found that this gave the Registrar no discretion. She was obliged to issue a Certificate provided she was satisfied about the authenticity of the accompanying documents. He found correctly in my view, that to hold otherwise would be to run counter to the clear language of Section 57.
- [11] He then found that Rule 5 had to be read in conformity with the Act: It is applicable only to Part II registrations which require advertisements under Section 12. Part III is a different concurrent and less complicated method of registration compared with Part II. In my judgment nothing could be clearer.
- [12] The Registrar had correctly pointed out that the right of redress against a Part III registration lay to the High Court under Section 61 which states that the High Court shall have power on the application of any person who alleges that his interests have been prejudicially affected by the issue of a Certificate of Registration to declare that the rights and privileges conferred by such registration have not been acquired on any of the grounds upon which the United Kingdom registration might be cancelled under the Law for the time being in force in the United Kingdom.
- [13] Since Mokosoi's application was to be given the opportunity to oppose and have a hearing over Pure Fiji's Part III registration, which the Judge rejected, in my judgment he held correctly that Mokosoi had no right to object to the Registrar or have a hearing before the Registrar. Its remedy was to apply to the High Court and he therefore dismissed the applicant's originating Summons.

EXTENDING THE TIME TO APPEAL

[14] What I have said so far however is not sufficient to dispose of the present application. I must now consider whether the applicant can bring itself within the factors which are normally taken into account in deciding whether to grant an extension of time.

In Bahadur Ali and Ors v. Ilaitia Boila and Chirk Yam and Ors, Civil Appeal No. ABU 0030 of 2002, Reddy, P then President of Court of Appeal said at p7 –

“The power to extend the time for appeal is discretionary, and has to be exercised judicially, having regard to established principles (see Hart v Air Pacific Limited, Civil Appeal No. 23 of 1983). The onus is on the Appellants to satisfy the Court, that in the circumstances, justice of the case requires that they be given the opportunity to attack the Order...and the judgment.The following factors are normally taken into account in deciding whether to grant an extension of time-

1. *the length of delay*
2. *reasons for delay*
3. *the chances of the appeal succeeding if time is extended*
4. *prejudice to the respondent.”(my emphasis)*

[15] More recently, this Court has taken a much stricter approach to applications for leave to extend the time to appeal. In Vimal Construction and Joinery Works Ltd v. Vinod Patel and Company Ltd (2008) FJCA 98; the Court of which I was a member said at paragraph 15, signaling the new stricter approach, at para [15] –

“[15] in 2008 litigants should not assume that leave will be given to bring or maintain appeals or other applications where those appeals or applications are out of time unless there are clear and cogent reasons for doing so. A contention as to incompetence of legal advisers will rarely be sufficient and, where it is, evidence “in the nature of flagrant or serious incompetence (R v Birks (1990) NSWLR 677) is required.”

[16] This dictum was applied by the Court again in Woodstock Homes Fiji Ltd v Rajesh (2008) FJCA 104 and Fiji Electricity Authority v Arbitration Tribunal (2008) FJCA 28.

[17] Has the applicant shown clear and cogent reasons which would justify me granting the application? In my view it has not. I said earlier that the applicant has listed ten proposed Grounds of Appeal the drafting of which I have criticized but bad drafting can be ignored if the Court considers that the applicant is likely to be prejudiced by the actions of its legal advisers if such a course can be justified. No Court likes to shut the door on any appeal which arguably has reasonable prospects of success.

[18] I had hoped to be able to avoid setting out the proposed Grounds of Appeal but in the interest of justice I cannot do so. I shall therefore state them in their original form and then give what I think is a fair summary of them in simpler terms than those before the Court:

1. *The Learned Trial Judge erred in law in construing the application for relief by the Appellant as not seeking the expunging of the Trademark from the Register by failing to so hold that the relief sought in the Summons in subparagraph (a), where it sought that United Kingdom Trade Mark No. 2373416 (hereinafter referred to as "the UK Mark") "be expunged or cancelled or removed from the Register forthwith" was and amounted to an application for expunging the Mark and erred in holding that the Appellant was not seeking the expunging of the Mark from the Register.*
2. *The Learned Trial Judge erred in failing to hold and further in failing to construe the provisions of s.55 in Part III – United Kingdom Trade Mark as requiring, either on its face or impliedly, a Notice of Opposition to be enabled to be filed pursuant to an application for registration of a Mark within the provisions of Part III of the Trade Marks Act Cap 240 (hereinafter referred to as "the Act").*
3. *The Learned Trial Judge further erred in failing to hold that the registration of the UK Mark, registered in Fiji as Trade Mark No. 50/60 (hereinafter referred to as "TM 50/60"), in the circumstances as found and more particularly set out below, amounted*

to an abuse of process and/or constituted a contempt of Court by the First Respondent in circumstance where:

- (a) The First Respondent, Pure Fiji Export Limited, and the Applicant in respect of Trade Mark 143/2000 (an application pursuant to Part II – General) filed by Sandollars Fiji Limited and to which the Appellant filed a Notice of Opposition upon it being advertised on 2 August 2002 was, in the circumstances, effectively an application where the Respondent, Pure Fiji Export Limited and the Applicant in respect of Trade Mark 143/2000, Sandollars Fiji Limited (hereinafter referred to as “Sandollars”), had common directors, shareholders and registered office and were effectively possessed of a commonality of corporate features such that they were the alter ego of each other, to the extent that the Counter Statement in respect of the application for the Trade Mark 143/2000 was filed by Pure Fiji Export Limited (hereinafter referred to as “Pure Fiji”) and not Sandollars, as so found; and
- (b) The application, having invoked the jurisdiction of a Fiji Court and in particular within the jurisdiction of the Administrator-General, pursuant to the Act, in respect of Mark 143/2000 was, and remains, an effective proceeding in the circumstances and as yet resolved; and
- (c) The failure to prosecute, seek a formal discontinuance or to bring to a conclusion the proceedings invoked in the Fiji Tribunal, by Sandollars and the recourse thereafter by the Respondent to the United Kingdom to register a Mark and attempt to have it registered (which was undertaken) without resolving the initial application in Mark 143/2000 by Pure Fiji amounted to an abuse of process and/or a contempt of Court in so far as it, as found, deprived the Appellant of its rights to have its position determined in respect of Mark 143/2000.

4. The Learned Trial Judge further erred in the circumstances in finding that the Appellant had no locus to challenge and/or seek to be heard concerning the registration of the TM 50/06, formerly the UK Mark, in circumstances where the Appellant had invoked the jurisdiction of this Court and more particularly the provisions of the legislation which, in circumstances as ultimately found by the learned trial judge have deprived the Appellant of the right to be heard and in the circumstances have perfected the abuse of process in seeking to register the Trade Mark in the United Kingdom and then have it registered, without any opportunity of

opposition to the same, despite the earlier proceedings being instituted and unresolved in circumstances that amounted to an abuse of process.

5. *The Learned Trial Judge further erred in failing to construe the Rules as requiring registration but that such registration be accompanied by advertisements in respect of trade by the need for the application to be advertised by virtue of the provisions of Part III of the Act.*
6. *The Learned Trial Judge erred further in failing to construe and give effect to the principles of statutory construction by failing to hold that the words "subject to the provisions of this Act" are not to be confined within the parameters of the Act in circumstances where the Rules would not accommodate the provision for advertisement of applications registered in the United Kingdom and in particular in circumstances where such applications had, or were associated with earlier and as at that time unresolved applications made in a Fiji Court and/or Tribunal, concerning the same or similarly made application for a Mark as occurred in the case under consideration.*
7. *The Learned Trial Judge further erred in law in failing to hold that in respect of Part III registrations a person had no right to object to the Registrar in respect of an application or to have a hearing before the Registrar and in particular further erred in circumstances where there had already been an application before the Registrar (unresolved) pursuant to Part II, (which was unresolved) and which in the circumstances constituted an abuse of process or possible an abuse of process until so determined pursuant to a hearing before the Registrar as made and provided.*
8. *The Learned Trial Judge further erred in failing to hold that s.61 of the Act afforded to the Appellant as a person aggrieved, the power to determine either before the Registrar of Court, the basis of the manner in which they were said to be aggrieved, by reason of the registration of the Part III Mark when proceedings were under way and unresolved in respect of an application for a Part II Mark as occurred in the case at bar.*
9. *The Learned Trial Judge further erred in failing to hold that the Registrar was and further at all material times had a right to seek and/or support relief pursuant to s.46 of the Act and that in the circumstances the argument concerning the compromising of the sovereignty of the Fijian legislature and the legislation made there under was by reason of the Part III Mark being registered when application was made under Part II*

and as at that date unresolved, i.e. the date of registration of the Part II Mark, was tantamount to an abrogation of the sovereignty of the Fijian legislature and the legislations so made in respect of Trade Marks.

10. *The Learned Trial Judge further erred in law by failing to hold that the proceedings in respect of the application for the Mark 143/2000, having been brought pursuant to the Act, and there having been no notice given concerning the non-completion, as provided in s.17 the application was not abandoned. Further the resort by the First Respondent, having filed a Counter-Statement to application 143/2000, to thereafter proceed to register a Mark in the United Kingdom and have it brought to Fiji for registration in application 50/06, constituted by it, as a litigant, a usurpation of the power of the Administrator General and/or Registrar, as found by the learned trial judge and in which he erred in law and which was tantamount to a denial of the right of the Appellant, as a litigant, to have its rights determined in accordance with the law, the dispute having been submitted pursuant to the Act and upon which it was entitled to rely for the determination of that dispute according to law and not otherwise.*

[19] In my view Ground 1 simply alleges that the Learned Trial Judge erred in law in construing the application for relief by the Applicant as one not seeking the expunging of the Mark from the Registrar. My only comment on this is that the High Court despite drafting errors did decide to proceed with the motion as one seeking the expungement of the Pure Fiji trademark.

[20] Section 55 of the Act provides only for the Right of the Owner of a United Kingdom Trademark to apply to have it registered in Fiji. Section 57 confirms this and in my judgment the Trial Judge was correct in his so finding. The important thing here is that there is no proposed appeal against that finding of the Judge

[21] **GROUND 3**

I spent considerable time trying to understand what the applicant meant by Ground 3 but essentially it seems to me this is an allegation that the Learned Trial Judge erred in failing to hold that the registration of the United Kingdom mark in Fiji amounted to an abuse of process or a contempt of Court by the first respondent.

[22] I have found nothing in the material before me to indicate that an application before the Registrar is subject to the principles governing abuse of process or contempt of court but particularly when the Marks in the two applications were not identical, a finding that the applicant does not seek leave to appeal against. Furthermore I know of no case which holds that abuse of process and contempt of court are grounds for overturning a decision. The first can be a ground for an interlocutory application to strike out a pleading or affidavit, the second is usually the basis of an application for a penalty. It seems to me that here the applicant argues that Section 57 must be construed as allowing an opposition where there has been an opposition to a similar but not identical mark which has not yet been withdrawn under Part II. In my judgment such an argument has no foundation and I reject it.

[23] **GROUND 4**

As to this I would only say that I found nothing in the Judgment to the effect that Mokosoi had no locus to challenge Pure Fiji's registration. The effect of the Judgment was that there was no legal basis upon which Mokosoi could obtain any order to have the Mark expunged by the particular proceedings and advertised so as to enable it to oppose it. However the Court held that Mokosoi might have redress under Section 61 and with that, the right to be heard. I do not consider this ground arguable.

[24] **GROUND 5**

I find this ground unintelligible and therefore do not consider it.

[25] **GROUND 6**

This is another ground which I found it almost impossible to understand. I take it to mean that it alleges that the learned trial judge erred in holding that the words "subject to the provisions of this Act" meant the Registrars' Rules, must be complied with within the parameters of the Act in circumstances where the rules made no

provision for the advertisement or applications registered in the United Kingdom and particularly, as here, where the applications were associated with unresolved applications made in a Fiji Court or Tribunal. In my opinion the short answer to this ground is that if there is no provision in the Act itself requiring the advertisement in Fiji of applications registered in the United Kingdom, that is the end of the matter. I take the phrase used by the Applicant "**where the rules would not accommodate the provisions for advertisement of application registered in the United Kingdom**" to mean simply that there are no rules in the Act providing for such advertisement. It is common ground that there are no such rules but the applicant appears to be contending that this was a lacuna in the Act which the Court was entitled to fill by reading in a requirement for advertisements. To do this would be contrary to the well established principles of statutory interpretation.

[26] I remind myself again that this Act has been in force now for 76 years without any amendments to my knowledge. I do not understand either Party to allege there have been amendments. As I have said, I agree with the Learned Judge that Section 57 is clear in its meaning. There simply is no requirement for advertisement in Fiji for an application registered in the United Kingdom. Further, any rules made under the Act can only be made subject to the Act as the Learned Judge said correctly. I have no hesitation in saying that this proposed ground lacks any merit and cannot be supported in law.

[27] **PROPOSED GROUND 7**

This Ground has no merit for the simple reason that it is not what the Judge held. The Judge actually held that a person had no right to object to or be heard on a Part III Registration. He did not fail to hold but actually held this to be so.

This Ground is obviously unarguable and I reject it.

[28] **GROUND 8**

In my view this ground has no prospect of success when one considers Section 61 which reads :

“Power of Court

61. **The Court** shall have power upon the application of any person who alleges that his interests have been prejudicially affected by the issue of a certificate of registration to declare that the exclusive privileges and rights, conferred by such certificate have not been acquired on any of the grounds upon which the United Kingdom registration might be cancelled under the law for the time being in force in the United Kingdom.”

[29] It is obvious that this Section provides only for relief to be sought from the High Court on the grounds given in that section. The Court so found. There is no right in the applicant to read in words to the effect that the Registrar also has the power given by Section 61. He clearly does not and I reject this ground as being without any merit.

[30] **GROUND 9**

This ground is not supported by the judgment. The Court did not find that the Registrar could not appear or be heard as provided in Section 46. In fact the Registrar appeared and was heard. The Judge rejected the second respondent’s submissions which, he said on page 11 of his judgment he found difficult to follow as they did not address issues raised by the Originating Summons. He said, and I agree, that the submissions of the second respondent fundamentally sought a legislative change and asked the Court to pronounce that the Part II provisions should also apply for applications under Part III. He said this was a matter not addressed by the

applicant and only fleetingly by the First Respondent. He said: "If there is need for legislative change, the Administrator-General should put its concern before the Parliament when it next sits".

I agree. As far as the Sovereignty argument mentioned in this ground is concerned, like the Judge, I find the argument difficult to accept. I do not consider there is any attack on the sovereignty of Fiji in Part III of the Act. The Learned Judge held that the Fiji Law which allows registration of a foreign trade mark is not an abrogation of sovereignty but rather an exercise of it. The Learned Judge said this at page 12 when he remarked, "it is our Parliament which in exercise of its sovereignty has passed the Legislation". I would have thought there can be no doubt about that. Then, the Judge gave some examples of other Foreign Legislation still being applied in Fiji like the United Kingdom Army Act. He also mentioned the Consumer Credit Act and the Land Transfer Act both of which are almost identical copies of overseas laws. That does not mean that by passing similar legislation in Fiji, Parliament is abrogating the Sovereignty of Fiji. All that it is doing, is to say that this legislation is also desirable in Fiji, and history has proved this to be true.

[31]

GROUND 10

Like most of the other proposed grounds I found this also difficult to understand. It seems to allege that there was something sinister in the first respondent registering its trade mark in the United Kingdom. Nothing could be further from the truth. It was entitled to register the mark under the law of that country. The Ground also seems to ignore the fact that the earlier trade mark was not identical, which was admitted by the applicant.

[32]

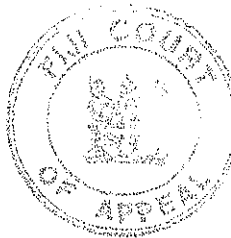
CONCLUSION

It is true that this Court in considering an application for leave to appeal should not delve into the merits of the proposed appeal. That does not mean however that the Court should not closely examine the Grounds of Appeal with a view to deciding whether or not any of them are likely to succeed if time is extended.

[33] I am satisfied they would not succeed. I also consider that any appeal would prejudice Pure Fiji by putting it to unjustified expense and delay. The Court's list for the last session of this year is already full and some cases will have to be left over to first session of the Court in the new year. If I were to grant leave to appeal it would mean that the first respondent would have been denied the fruits of its judgment for probably about two years if not longer. In all the circumstances in this case I consider such a delay could not be justified.

For the reasons which I have given, I therefore reject the applicant's application and order it to pay the first respondent's costs which I fix at \$2,000 within 21 days of the delivery of this Ruling.

Dated at Suva this 7th day of September 2009.



John E. Byrne

JOHN E. BYRNE

JUDGE OF APPEAL